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ERRATA

Page 38, line 9 from top, for *725* read *527*.

Page 46, line 8 from bottom, for *Potlach* read *Potlatch*.

Page 57, line 14 from bottom, for *Walcott* read *Wolcott*.

Page 88, line 15 from top, for *Hawes v. Petit* read *Petition of Hawes*.

Page 265, line 18 from top, for *114* read *144*.

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 16574. Department Two. September 2, 1921.]

THE STATE OF WASHINGTON, *on the Relation of* GEORGE D. FARWELL, *Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*[1]

ARMY AND NAVY—SOLDIERS' BONUS—RIGHTS OF SURVIVING PARENT—STATUTES—CONSTRUCTION. Under ch. 1, Laws Ex. Sess. 1920, providing a bonus to a soldier's surviving widow, if not remarried at the time compensation is requested, "or in the event he left no widow or children, then to his surviving parent or parents if actually dependent upon such deceased person for support," a father would not be entitled to compensation where the deceased had left a widow, although her right to take had been eliminated by her subsequent remarriage.

Application filed in the supreme court May 18, 1921, for a writ of mandamus to compel the state auditor to issue to relator a warrant for compensation under the soldiers' bonus act. Denied.

Geo. McKay, for relator.

The Attorney General and *Nat U. Brown,* for respondent.

MITCHELL, J.—The relator, George D. Farwell, seeks compensation under the provisions of ch. 1, p. 7, Laws of the Extraordinary Session, 1920, viz: "An act providing for the payment of equalized compensa-

[1]Reported in 200 Pac. 563.

tion to veterans of the war with the Central Allied Powers, etc.". The petition, to which the respondent has filed a general demurrer shows: That relator is the surviving father of Major George W. Farwell, who engaged in active service of the United States in the war with the Central Allied Powers from May 8, 1917, until September 30, 1918, when he died in France of wounds received in battle; that Major Farwell died without issue, his wife surviving him; that she remarried about June 1, 1919; and that, at and prior to the time of the death of the son, the father was actually dependent upon him for support.

That portion of the law that controls this case is a part of § 1 as follows:

"In case of the death of any such person while in such service an equal amount shall be paid to his surviving widow, if not remarried at the time compensation is requested, or in case he left no widow and left children, then to his surviving children, or in the event he left no widow or children, then to his surviving parent or parents if actually dependent upon such deceased person for support."

The language of the statute is clear that the right of a dependent father to receive the compensation is conditioned on the domestic status of the son at the time of his death. The condition is "in the event he left no widow or children, then to his surviving parent." The complaint alleges that the deceased did leave a widow, and the fact that she subsequently remarried prior to the effective date of the act of the legislature in question is in no way helpful to the father in his claim for compensation.

Writ denied.

PARKER, C. J., MAIN, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 16608. Department Two. September 2, 1921.]

THE STATE OF WASHINGTON, *on the Relation of James R. Royse, Plaintiff*, v. THE SUPERIOR COURT FOR SAN JUAN COUNTY, *E. H. Hardin, Judge, Respondent.*[1]

ATTORNEY AND CLIENT (1)—ADMISSION TO PRACTICE. Under Laws 1917, ch. 115, § 17, the board of state law examiners is charged with the duty of examining into the fitness of an attorney from another state who applies for a permanent certificate to practice law.

COSTS (47)—COUNTIES (52)—EXPENSES AND CHARGES—LIABILITY FOR STENOGRAPHER'S FEES—STATUTES. Under Laws 1917, ch. 115, § 18, where an investigation is held by the state board of law examiners upon the application of an attorney to admission to practice in the state, the county is liable for the stenographer's fees and costs of the investigation, subject to the approval of the items thereof by the court or presiding judge of the county.

MANDAMUS (28)—TO COURTS—ALLOWANCE OF COST BILL—MINISTERIAL DUTIES. The duty of the court to direct payment of a cost bill for the expenses of investigation of the fitness of an attorney to practice law, after approval of the items, being a ministerial one, mandamus will lie to compel its performance by the court.

Application filed in the supreme court June 17, 1921, for a writ of mandamus to compel the superior court for San Juan county, Hardin, J., to allow a cost bill in proceedings had before the state board of law examiners. Granted.

The Attorney General and *O. R. Schumann, Assistant*, for relator.

Samuel R. Buck, for respondent.

TOLMAN, J.—This is an original proceeding in mandamus to require the respondent, as judge of the superior court for San Juan county, to allow a cost bill incurred in certain proceedings had before the state board of law examiners.

It appears that one Elmon A. Geneste, residing in San Juan county, and there practicing law under a

[1]Reported in 200 Pac. 562.

temporary license, made application for a permanent license to practice before the courts of this state. Objections to the issuance of such a permanent license having been made, the board of law examiners, proceeding regularly, caused a complaint to be filed and a hearing thereon to be had in the county where the applicant resided. Witnesses were subpoenaed and examined, a court reporter was employed to take and transcribe the testimony, and thereafter the board duly prepared, certified and filed with the Honorable William H. Pemberton, then a judge of the superior court for San Juan county, a cost bill and statement of the expenses so incurred, which cost bill shows that the relator, who was the reporter so employed, is entitled to receive $394.93 for services rendered in the hearing referred to; whereupon Judge Pemberton entered an order which provides:

"It is hereby ordered: (1) That the several items set forth in said cost bill were justly and properly incurred, and said persons named in said cost bill are justly entitled to compensation therefor, and that said cost bill and said items are found in all things to be correct and proper, and are hereby approved. (2) That said cost bill so approved be and is hereby disallowed as not being within the purview of § 18, of ch. 115, of the Session Laws of 1917."

Shortly thereafter the term of office of the judge who made the order expired, and respondent having declined to enter an order directing the payment of the several items set forth in the cost bill, upon the ground that the previous order was a final one, this action was instituted.

It will be borne in mind that the proceeding in which the costs were incurred was pending before the board of law examiners and the superior court was in no wise concerned therewith, except that the fees and

expenses therein incurred are, by the statute, required to be approved by the court or presiding judge thereof, before the county shall become liable for their payment.

Chapter 115, p. 429, § 17, Laws of 1917, makes it the duty of the board of law examiners to pass upon all applications for the right to practice law in this state, and likewise makes it the duty of the board to ascertain that the holder of a temporary certificate, who makes application for a permanent one, is of good moral character and a proper person to practice law in this state, before certifying to this court that the certificate should be granted, and,

"The board shall enforce all the laws and ethics relating to the duties of attorneys, or other persons practicing or claiming the right to practice law, or to act as licensed law clerks, within this state. All complaints alleging acts of immoral or unprofessional conduct, or conduct in violation of the purpose and spirit of this act shall be filed with the board by any person knowing of such acts or conduct, or by the board itself upon its own motion."

Section 18, p. 429, of the act, so far as here in question, reads:

"For the purpose of this act the board or any member thereof shall have the power to issue subpoenas for the attendance of witnesses or the production of books or documents. Such subpoenas shall be served in the manner of serving subpoenas in civil cases in the superior courts of this state and the person so served shall comply with the requirements of such subpoena. The defendant shall be allowed the usual defenses and the issuance of such subpoenas as he may desire and as the board or member or members conducting such hearing may deem necessary. Witnesses shall testify under oath, which oath may be administered by any member of the board, and testimony shall be taken in writing or by deposition under such rules

as the board may provide. The prosecuting attorney of the county in which the defendant resides shall assist the board in the conduct of its hearings, or the board may request the attorney general to assist in such hearings, and when so requested it shall be his duty to so assist. When feasible the court reporter or stenographer authorized to report the proceeding in courts within the county where the defendant resides shall be the reporter for hearings conducted by the board, or the members thereof, as in this act provided; and such county, upon the approval by the court or presiding judge thereof, shall be liable for the witness and stenographer fees and other like expenses incurred in the conduct of such hearings."

There can be no doubt that it is as much the duty of the board to examine into the fitness of an attorney from another state who seeks admission here, as it is to hear charges against one already admitted. The hearing in question was fully authorized by § 18 from which we have quoted. Consequently the expenses attendant thereon were likewise duly authorized, and the liability therefor of the county where the hearing was held is by the statute clearly fixed, subject only to the approval of the cost bill or items by the court or judge. This being so, it seems to follow that the court or judge thereof in such a matter may exercise discretion only in the allowance or disallowance of the particular items, as it may appear that they are reasonable or otherwise, or that the services were actually rendered as claimed. Having found the items in the cost bill here involved correct, proper and justly incurred, his duty to direct their payment became purely a ministerial one, and since it is the settled law of this state that mandamus is the proper remedy in cases where the duty sought to be performed is ministerial, the writ will issue as prayed for.

PARKER, C. J., HOLCOMB, MAIN, and MITCHELL, JJ., concur.

[No. 16366. Department One. September 8, 1921.]

J. ETHEL RORABAUGH, *Respondent*, v. GREAT EASTERN CASUALTY COMPANY, *Appellant*.[1]

APPEAL (454)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE OTHERWISE ESTABLISHED. The admission of hearsay evidence is not prejudicial error where it is addressed to matter already properly put in evidence.

SAME (123)—PRESERVATION OF GROUNDS—OBJECTIONS TO EVIDENCE. The improper admission of testimony cannot be urged as error on appeal where it was not objected to at the time, nor motion to strike interposed.

INSURANCE (185)—ACCIDENT INSURANCE—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY. The direct cause of death, in an action on an accident insurance policy, was properly a question for the jury under evidence showing death was caused by blood poisoning which resulted from a cut on the finger, the cutting and the inoculation being simultaneous.

SAME (128)—ACCIDENT INSURANCE—DEATH OF INSURED—"EXTERNAL, VIOLENT AND ACCIDENTAL MEANS"—CONSTRUCTION OF POLICY. Where an accident policy insured against all the effects of bodily injury caused directly, solely and independently of all other causes by external, violent and accidental means, the beneficiary was entitled to recover the full indemnity for death, which was due to blood poisoning resulting from an accidental cut, though another provision of the policy limited liability to one month's indemnity in case of death from blood poisoning; since the cutting of insured's finger, inducing blood poisoning, was the direct and external means whereby death resulted.

SAME (127)—ACCIDENT INSURANCE—CLASSIFICATION OF RISK. Under a provision of an accident policy insuring against bodily injury resulting in continuous disability from the date of the accident, it is not contemplated that there must be a disability from the very moment of injury; hence, where the insured became sick with blood poisoning within twelve hours after cutting his finger, and on the third day after the injury took to his bed, which he never left, the injury was one coming within the "continuous disability" clause.

Appeal from a judgment of the superior court for King county, Hall, J., entered November 3, 1920, upon

[1]Reported in 200 Pac. 587.

the verdict of a jury rendered in favor of the plaintiff, in an action on an indemnity policy. Affirmed.

Roberts & Skeel and *J. J. Geary,* for appellant.

Jones, Riddell & Brackett, for respondent.

BRIDGES, J.—This action was for recovery upon an accident and sickness indemnity policy, issued by the defendant to Clyde Roy Rorabaugh, the plaintiff being the beneficiary therein named. The facts are not greatly in dispute, and are as follows: The insured was a practicing physician and surgeon in the city of Seattle. On the 5th day of April, 1919, he performed a surgical operation on one of his patients. On the afternoon of the 6th he examined and dressed the wound resulting from the operation. Within a very few hours thereafter, while moving an old and rusty bed spring, he slightly cut one of the fingers of his right hand by coming in contact with the end of one of the wires. During the following day, to wit, the 7th, he complained of not being well and of having considerable pain in his right arm. His condition continued to grow worse until on the 9th he was required to take to his bed, where he remained until his death, about a week afterwards. He died of septicemia, or blood poisoning. Prior to the cutting or scratching of his finger, he was in the best of health. The testimony of the experts and others was strongly to the effect that the inoculation of his finger with the germs which caused the blood poisoning was coincident with the cutting of the finger, and the jury returned a special verdict so finding. It also returned a general verdict for the plaintiff in the sum of $1,560, being the amount sued for. In its answer the defendant tendered the sum of $120 in full of its liability. It has appealed from the judgment entered on the verdict.

The matter first to be discussed is concerning the introduction of certain testimony. Complaint is made that one witness was allowed to testify that "I asked him (the insured) what was the trouble, and he held up his finger and said, 'That scratch I got on that old spring'." We need not discuss this point further than to say that, in no event, could the defendant have been prejudiced by the receipt of this testimony, because all the testimony in the case shows that he was sick and that he had received the scratch mentioned.

Complaint is made that another witness was permitted to testify that the deceased said, "there is a bunch under my arm as big as an egg, and it is all swelled, etc." This objection may be disposed of for the reasons above given.

Error is claimed concerning the admission of portions of the testimony of Dr. Rickards. The appellant did not object to any questions which brought forth the testimony of which complaint is made, nor did it move to strike such testimony. The necessary result is that it is in no position to now complain.

The appellant also contends that there was not sufficient testimony concerning the cause of the death of the insured to justify the case being sent to the jury. We are unable to see upon what ground this contention can stand. A reading of the testimony shows that a number of witnesses testified that the immediate cause of death was blood poisoning, and the immediate cause of the blood poisoning was the cut on the finger, and that the cutting of the finger and its inoculation were simultaneous. Under the evidence, the direct cause of death (within the terms of the policy) was the injury to the finger. *Day v. Great Eastern Casualty Co.*, 104 Wash. 575, 177 Pac. 650; *Ballagh v. Interstate Business Men's Acc. Ass'n*, 176 Iowa 110, 155 N. W.

241; *Omburg v. United States Acc. Ass'n,* 101 Ky. 303, 40 S. W. 909, 72 Am. St. 413; *Western Commercial Trav. Ass'n v. Smith,* 85 Fed. 401; *Cary v. Preferred Acc. Ins. Co.,* 127 Wis. 67, 106 N. W. 1055, 115 Am. St. 997, 5 L. R. A. (N. S.) 926; *Freeman v. Mercantile Mut. Acc. Ass'n,* 156 Mass. 351, 30 N. E. 1013; *Thornton v. Travelers Ins. Co.,* 116 Ga. 121, 42 S. E. 287; *Garvey v. Phoenix Preferred Acc. Ins. Co.,* 123 App. Div. 106, 108 N. Y. Supp. 186.

The more important contention of the appellant is that, if it be conceded that the insured's death resulted exactly as respondent contends, still, under the terms of the policy, she is not entitled to recover any amount in excess of the amount tendered, to wit, $120. This argument requires a somewhat careful analysis of the policy. Its first clause states that it is an "accident and sickness policy, providing indemnity for loss of life, limb, limbs, sight or time by accidental means, and for loss of time by sickness—to the extent herein provided." The policy then proceeds to state that it insures

"Clyde Roy Rorabaugh, by occupation physician and surgeon, subject to all the agreements and limitations hereinafter contained . . . against all the effects of bodily injury, caused directly, solely and independently of all other causes by external, violent and accidental means, which bodily injuries or their effects shall not be caused wholly or in part, directly or indirectly, by any disease, defect or infirmity, and which shall from the date of the accident result in continuous disability; and also against the effects of sickness, as follows . . ."

The policy is thereafter divided into two main heads as follows: "Accident Indemnities" and "Sickness Indemnities." Section 1, under "Accident Indemnities" provides that "if any loss specified in this section shall result solely and exclusively from such

injury within three months from the date of the accident, the company shall be liable only for such loss, and will pay for loss of life $1,200," and shall pay certain stated sums for other designated losses, such as the loss of both hands or both feet, etc. Section 2 is also under the same heading of "Accident Indemnities" and provides in part that

"If such injury shall not result in any of the losses above specified, but shall from the date of the accident disable and prevent the insured from performing every duty pertaining to any and every kind of business or occupation and be regularly attended by a licensed physician, the company will pay for the period of such total disability, not exceeding thirty-six consecutive months, indemnity at the rate per month of $120."

Section 4, under the heading of "Accident Indemnities," provides for certain accumulations which, under the facts of this case, would raise the amount entitled to be recovered by respondent, if her theory of the case be adopted, from $1,200 to $1,560, the amount sued for. If there were nothing else in the policy pertinent to this case, it is perfectly clear that the respondent was entitled to recover the full amount sued for and that her judgment should be affirmed, because the testimony clearly shows that the death of the insured was caused "directly, solely and independently of all other causes by external, violent and accidental means," and was not caused "wholly or in part, directly or indirectly, by any disease, defect or infirmity," and because the jury affirmatively found that the deceased "suffered an accidental wound to his finger, and that coincident with such accidental injury, the wound was inoculated or infected with septicemia, causing his death." See authorities previously cited. In the case of *Day v. Great Eastern Casualty Co., supra,* we said:

"We think it is plain from the evidence that the bruise was the primary cause of death; it developed into a carbuncle and an infection which caused the death. We find no evidence to indicate that deceased was afflicted with diabetes prior to the injury, and there is no evidence to show that the symptoms of diabetes were not caused by the injury. It is more probable that the symptoms of diabetes were caused by the injury than that death resulted from diabetes or other disease."

In that case we adopted and quoted from the case of *White v. Standard Life & Acc. Ins. Co.*, 95 Minn. 77, 103 N. W. 735, 884, the following:

"The concensus of judicial opinion is that, subject to the exceptions contained in the policy, if the injury is the proximate cause of death the company is liable, but if an injury and an existing bodily disease or infirmity concur and cooperate to that end, no liability exists. If, however, the injury be the cause of the infirmity or disease—if the disease rests in and springs from the injury—the company is liable, though both cooperate in causing death."

But appellant strongly relies upon § 10 of the policy and claims that it is a limitation upon those portions of the policy which we have already quoted, and that, by virtue of such limitations, the respondent is entitled to recover only $120. Section 10 is denominated, "Special Provisions" and provides that,

"In the event of death . . . resulting from the following causes, the company's liability shall be one month's indemnity as provided in §§ 2 and 5 of this policy . . . injuries intentionally inflicted upon the insured by any other person; unnecessary exposure to danger, riot, strike or evading arrest; gas vapor or poison; contact with poisonous substances, *blood poisoning or septicemia* . . . or due partly to injury and partly to disease or bodily infirmity . . ."

It is our opinion that § 10 has reference solely to death resulting from the causes therein mentioned, including "blood poisoning or septicemia" and does not apply to an injury "caused directly, solely and independently of all other causes by external, violent and accidental means . . ." Here the death was the direct result of the injury to the insured's finger, and not the direct result of blood poisoning. If the insured's death had been the direct result of blood poisoning which was not in any wise connected with an injury caused by "external, violent and accidental means," then the contentions of the appellant would probably be correct. The quoted portion of § 10 has to do only with indemnity concerning loss of time, and is not consistent with the indemnity to be paid in the event of death directly resulting from external, violent and accidental means. To give § 10 the construction desired by the appellant would be in part to nullify § 1 of the policy; the construction which we have given it makes it harmonize with all the provisions of the policy.

The appellant strongly relies on the case of *Anderson v. Great Eastern Casualty Co.*, 51 Utah 78, 168 Pac. 966. It will be observed that the defendant in that case is the defendant in this. Most of the provisions of the policy involved there were in substance the same as the one involved here. In that case the assured accidentally injured her ankle and thereafter died of blood poisoning, the blood poisoning being the result of the injury. The court in substance adopted the contentions of appellant here, but based its decision upon a provision in the policy reading as follows: "Any loss resulting wholly or in part, directly or indirectly, from sunstroke, freezing, carbuncles, boils, felons, abcesses, ulcers, blood poisoning or septicemia

. . . shall be considered as resulting from sickness and covered only under § 5 of this policy, the original causes thereof notwithstanding."

It will be noted that the provisions of that policy are very different, indeed, from the provisions of § 10 of this policy, because there it was expressly provided that loss from blood poisoning or septicemia, or any of the other ailments therein mentioned, should be considered "as resulting from sickness and covered only under § 5 of this policy, the original cause thereof notwithstanding." There is no such provision in the policy in this case. Besides, that case was so decided by a bare majority of the court. While no cases have been cited to us, nor have we found any, where the policy contained the exact provisions found in § 10 of the policy involved here, the following cases are in point and controlling: *Berry v. United Comm. Trav. etc.*, 172 Iowa 429, 154 N. W. 598, L. R. A. 1916B 617, and note; *Thornton v. Travelers Ins. Co.*, 116 Ga. 121, 42 S. E. 287; *Travelers Ins. Co. v. Murray*, 16 Colo. 296, 26 Pac. 774, 25 Am. St. 267; *Garvey v. Phoenix Preferred Acc. Ins. Co., supra; Ballagh v. Interstate Business Men's Acc. Ass'n, supra; Schwinderman v. Great Eastern Cas. Co.*, 38 N. D. 584, 165 N. W. 982. In the case last cited, the policy provided that "this insurance does not cover . . . loss from injuries fatal or otherwise, resulting wholly or in part, directly or indirectly from, or wholly or in consequence of . . . hernia . . ." The plaintiff received a hernia as a result of a fall, and the hernia caused him loss of time. The defendant contended that, under the above quoted clause, plaintiff could not recover. The court said:

"It is not stated, and consequently cannot be assumed to have been meant, that the insurance was not

to cover an injury from which hernia resulted. In other words, under the language of the policy, where hernia is the cause, the insurance is not applicable, but where something else is the cause, and hernia is the result, the limitation does not apply."

Appellant also seems to lay some stress upon that portion of the policy which provides insurance against bodily injury caused by external, violent and accidental means, "and which shall from the date of the accident result in continuous disability." The policy evidently does not mean that there must be a disability from the very moment of injury, because in an injury of the character here involved, that would be impossible. But there was in this case a disability within the fair meaning and construction of the quoted words. The testimony shows that within twelve hours after the cutting of the finger the insured became sick, and that on the third day after his injury he took to his bed, which he never left.

It is our opinion that the judgment should be affirmed; it is so ordered.

PARKER, C. J., FULLERTON, and HOLCOMB, JJ., concur.

[No. 16207. Department One. September 8, 1921.]

HERMAN A. HOROWITZ, *Appellant*, v. H. A. KUEHL *et al.*, *Respondents*.[1]

FRAUD (5)—SALES—MISREPRESENTATIONS—VALUE OF PROPERTY—FUTURE EVENTS OR EXISTING FACTS. False representations as to the standing of a musicians' directory are not mere "trade talk" or "seller's praise" but are actionable, when made with intent to deceive, and they did deceive the purchaser, as to the value, although connected with future events, intermingled with existing facts, which formed an integral part thereof.

EVIDENCE (104)—HEARSAY—DECLARATION OF THIRD PERSONS—ADMISSIBILITY. Under the rule that evidence of matters of general reputation or notoriety is not hearsay, it was competent, upon an issue as to the standing of a directory of musicians among musicians, for one of that class to testify that the directory had no standing, though his knowledge was based on inquiry among musicians.

BILLS AND NOTES (127)—ACTIONS—ADMISSIBILITY OF EVIDENCE—FRAUD. In an action on a promissory note, to which the defense was set up that it was procured through false and fraudulent representations as consideration for the sale of publishing rights for a directory in certain territory, evidence concerning the acts and conduct of the seller subsequent to the consummation of the sale was properly admissible upon the issue of fraud.

MACKINTOSH, J., dissents.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 6, 1920, upon the verdict of a jury rendered in favor of the defendants, in an action on a promissory note. Affirmed.

Winter S. Martin and *Ralph H. Higgins*, for appellant.

Lundin & Barto, for respondents.

FULLERTON, J. — The appellant, Horowitz, brought this action against the respondents, Kuehl, Wood and Penny, to recover upon a promissory note, payable to himself or to his order, in the sum of two hundred

[1]Reported in 200 Pac. 570.

and twenty-five dollars. The respondents answered, admitting the execution and delivery of the note and its nonpayment, and as an affirmative defense and cross-complaint, alleged that the note, together with one hundred dollars in cash, was given to the appellant as the purchase price for the exclusive right to use the trade name of "National Musicians' Directory Co.," and the exclusive right to publish a musicians' directory in the states of Washington, Oregon, Utah, Idaho and California; that the rights granted were of no value; and that they were induced to enter into the contract because of false and fraudulent representations made to them by the appellant. After issue joined, the action was tried by the court sitting with a jury, and resulted in a verdict and judgment to the effect that the appellant take nothing upon his cause of action, and that the respondents recover the one hundred dollars paid.

The errors assigned on the appeal are twenty-five in number, but as many of them suggest the same question in different forms only, separate consideration of each of them is not required.

In the answer, the false and fraudulent representations inducing the sale were charged in the following language:

"That the said plaintiff represented to said defendants that the musicians' directory published by the National Musicians' Directory Company was the only musicians' directory published in the states of Washington, Oregon, Utah, Idaho and California; that the National Musicians' Directory Company had a copyright and no other musicians' directory could be published in said states; that the National Musicans' Directory was the only directory of musicians published in the United States; that the National Musicians' Directory then and there had such a high standing with the musicians in the northwest that 95 per cent of the

musicians would renew their subscriptions without solicitation; that the plaintiff had made over $10,000 by selling the directory in Chicago alone, and that he had made $80,000 by publishing these directories."

The appellant moved to strike these allegations, and after its motion had been overruled, interposed a general demurrer to the cross-complaint, which was likewise overruled. The first of the errors assigned are based upon these rulings, the contention being that the representations charged are not actionable, even though falsely and fraudulently made. The argument is that the statements are in part too remote, and are in part nothing more than what is commonly denominated "trade talk" or "seller's praise," and relate in part to future events, not to an existing fact. None of these objections is, in our opinion, well taken. They related, for the greater part at least, to past and existing facts, and were of such a nature that they would have greatly added to the value of a thing purchased, if true. Particularly, objection is made to the allegation that the appellant had made more than ten thousand dollars by selling the directory in Chicago alone, and had made eighty thousand dollars by publishing the directories. It may be that these statements were not intended to be understood literally, and it may be that the purchasers had no right to so understand them, but this is a very common way of representing a thing as having value, and in this sense the purchaser had a clear right to understand them. False representations as to the value of a thing sold, when made with intent to deceive, and when they do deceive the purchaser to his injury, are actionable. Particular objection is made also to the statement that the directory had such high standing among the musicians of the northwest that ninety-five per centum of them would renew their subscriptions to the publication

without solicitation. But this, likewise, is a representation of value, and the objection that it relates to future events and not to an existing fact is not tenable. Moreover, it is not the rule that all false representations as to future events are nonactionable. When they are so intermingled with existing facts as to form an integral part thereof, the representation as a whole may be shown. Such was our holding in *Fischer v. Hillman,* 68 Wash. 222, 122 Pac. 1016, 39 L. R. A. (N. S.) 1140. It is true that the precise question was not there discussed, but the conclusion announced could rest upon no other principle. See, also, *Stanton v. Zercher,* 101 Wash. 383, 172 Pac. 559; *Sowles v. Fleetwood,* 97 Wash. 166, 165 Pac. 1056. It follows that there was no error in the rulings to which complaint is made.

The second branch of the errors assigned relate to the admission of evidence. These, for the most part, suggest in another form the questions already noticed and need no further consideration. Among the assignments not so suggested are the following: In support of the allegation in the answer to the effect that the appellant had falsely represented the standing of the directory among musicians of the northwest, the respondents called one of their number and interrogated him as to the standing of the directory among such musicians. He answered that it had no standing, and on further questioning answered that he had acquired his knowledge of the fact by inquiry from among the musicians. A motion to strike the testimony was overruled, and error is predicated thereon for the stated reason that the testimony was hearsay. We do not so understand the rule. As said by Professor Greenleaf in his work on Evidence, vol. 1, § 101:

". . . evidence of general reputation, reputed ownership, public rumor, general notoriety, and the

like, though composed of the speech of third persons not under oath, is original evidence and not hearsay; the subject of the inquiry being the concurrence of many voices to the same fact."

On this principle the witness was competent to testify to the fact. Testimony was also admitted, over objection, concerning acts and conduct of the appellant subsequent to the consummation of the sale. It was objected to this that it tended to show a breach of warranty of the contract of sale rather than fraud in the execution of the contract. But, without setting out the evidence at length, it is enough to say that it bore upon the good faith of the appellant and was evidence which the jury were entitled to consider when considering the question whether the sale was induced by false and fraudulent representations.

The remaining assignments relate to instructions given the jury and to instructions requested which the court refused. They require no special consideration. The instructions given covered the entire issues, were impartial, and are commendable for their extreme clarity. The court in this regard performed its full duty and no error resulted, even though certain of the requested instructions might have been properly given.

The judgment is affirmed.

PARKER, C. J., BRIDGES, and HOLCOMB, JJ., concur.

MACKINTOSH, J. (dissenting) — The pleadings and the proof, as I understand them, present no facts constituting actionable fraud. The representations which were made relate largely to things which were in the nature of expectations, and those which can be interpreted as being statements of past or present facts were not the ones which induced the making of the contract. I therefore dissent.

[No. 16404. Department One. September 8, 1921.]

BREWSTER DISTRICT UNIT, *Respondent*, v. L. E. MONROE *et al.*, *Appellants*.[1]

CONTRACTS (4)—MUTUALITY. A contract whereby one party agrees to haul and warehouse fruit grown by the other party is void for lack of mutuality, where the grower is not by its terms bound to deliver any given quantity of fruit.

EVIDENCE (168)—PAROL TO VARY WRITING—PRIOR OR CONTEMPORANEOUS AGREEMENTS. Where a written contract for the hauling and storage of fruit is void for want of mutuality, oral evidence is inadmissible to show that an agreement was made, at or before the time of the writing, that the grower bound himself to deliver all the fruit of the crop for a given year.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered September 20, 1920, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action on contract, tried to the court. Affirmed.

Corbin & Easton and *W. H. Hodge*, for appellants.

Johnson & O'Connor, for respondent.

HOLCOMB, J.—In its complaint against appellants, respondent, Brewster District Unit, a corporation, demanded judgment for the value of 12,000 apple box shooks, goods, wares and merchandise furnished and services rendered, of the total value of $5,470.48, during the year 1919, upon which payments are admitted in the sum of $1,204.31, leaving a balance due, as claimed, of $4,166.17, with interest on the sum of $1,980 from July 15, 1919, at the rate of six per cent per annum, and on $2,186.17 from November 30, 1919, at the rate of six per cent per annum.

Appellants answered and admitted that respondent sold and delivered to them approximately 11,000 apple

[1]Reported in 200 Pac. 841.

box shooks, admitted the purchase of certain merchandise during the season of 1919, and that certain services were rendered by respondent to the appellants in warehousing and hauling part of appellants' apple crop for the season of 1919.

Appellants also pleaded three payments on account, namely: $1,000, $227.58, and on April 27, 1920, after the commencement of the action, a third payment of $2,530.97, or a total of $3,758.55.

Appellants further pleaded an affirmative defense and counterclaim growing out of a certain written contract entered into between the respondent, Brewster District Unit, and appellants, Monroe Brothers, dated September 18, 1919, wherein respondent was to furnish services in warehousing and hauling fruit of the appellants, and claimed a breach of the contract. By reason of the breach and failure to perform on the part of the respondent, appellants alleged damages in the sum of $1,735,20, minus any balance that might be due the respondent for services rendered and merchandise sold and delivered.

The contract is herewith set forth as follows:

"Brewster District Unit warehouse and loading contract.

"This agreement, entered into this eighteenth day of September, 1919, by and between Monroe Bros., and of the county of Douglas, state of Washington, whose post office address is Brewster, Wash., hereinafter called the grower, the party of the first part, and the Brewster Union, hereinafter called the Unit, party of the second part, witnesseth:

"The period of this contract shall be for the year 1919.

"The Unit agrees to maintain and provide warehouse facilities for the warehousing and loading of the grower's fruit at the Unit Warehouse, at Brewster, Wash.

"The grower shall have all fruit delivered packed in plainly marked boxes with the grade, variety and sizes stamped on in regular form for labeling.

"The grower or shipper agrees to furnish all labels required put on boxes of apples so warehoused, also to give the Unit written instructions twenty-four hours before loading cars.

"The grower further agrees to pay the Unit the sum of (7½) seven and one-half cents per packed box of apples for all apples delivered to the Unit.

"The Unit agrees to furnish grower warehouse receipts, label, load, brace and manifest all fruit warehoused with Unit by said grower.

"The grower further agrees to pay the Unit the sum of 6c per packed box of apples for hauling fruit from ranch to warehouse.

"The Unit agrees to furnish trucks to move said fruit within twelve hours after notified by grower on phone and to pay all ferry charges. The Unit to be relieved of this hauling clause if ferry refuses to cross them."

The agreement was signed by the parties.

The respondent demurred to the affirmative answer and counterclaim and the demurrer was sustained, with permission to plead anew. An amended affirmative answer and counterclaim was filed and respondent demurred, which demurrer was sustained.

Subsequently, on the 27th day of September, 1920, a stipulation was entered into by and between Johnson & O'Connor, attorneys for respondent herein, and Corbin & Easton and W. C. Gresham, attorneys for appellants herein, whereby it was agreed that R. C. Monroe is not a member of the partnership composed of the appellants L. E. Monroe and V. B. Monroe, trading under the firm name and style of Monroe Brothers.

It was further stipulated and agreed that the appellants L. E. Monroe and V. B. Monroe are indebted

to the respondent in the sum of $1,635.20, together with interest at the rate of six per cent per annum on the following amounts: On $1,980 from July 15, 1919, to May 1, 1920; on $509.03 from December 1, 1919, to May 1, 1920, and on $1,635.20 from December 1, 1919, to the date of the judgment herein, on account of goods, wares and merchandise and services furnished to appellants by the respondent.

The stipulation also provided that appellants do not waive any rights they may have under and by virtue of their affirmative answer and counterclaim made and filed in this action, and that the indebtedness of appellants to the respondent should not in any manner be taken as a waiver of any rights of appellants which they may have by virtue of their affirmative defense and counterclaim.

On this stipulation, an order was entered sustaining the demurrer to the affirmative defense and counterclaim in appellants' amended answer, and making certain findings, which were that judgment be entered in this cause in favor of respondent without further proof, on account of appellants' failure and refusal to further plead in the action, to which order of the court, filed September 27, 1920, appellants excepted.

On the same date, the court entered judgment in favor of respondent and against the appellants in the sum of $1,635.20, together with interest at the rate of six per cent per annum on the amounts as stipulated, the interest totaling the sum of $184.98, and for respondent's costs and disbursements incurred in the action.

The pleadings, records and files compose the entire record on which the appeal is based.

The amended answer alleged some supplemental oral agreements and circumstances surrounding the

making of the written contract, apparently intended to furnish the basis of an independent consideration and inducements. It alleges the custom of fruit growers to make warehousing arrangements, and the warehousing concerns to make contracts for warehousing; that the parties, with knowledge of those customs, estimated the size of appellants' crop and one paragraph of the amended answer alleged that:

"At the time of entering into said agreement the parties especially understood that the contract was concerning all fruit harvested from the defendants' orchards, and all of the parties knew the customs concerning said agreements and knew of the necessity of making proper provisions prior to the time said fruit season began, which was the latter part of September, 1919."

The trial court held that the contract could not be enforced because of its lack of mutuality.

Appellants contend that the contract pleaded constitutes a bilateral contract, upon mutual considerations. They assert that both appellants and respondent agreed to perform certain acts; that appellants bound themselves to pay for certain services; that appellants suffered a restriction of the right of contract with others for the warehousing and hauling of their fruit for the year 1919; that respondent obtained valuable rights in that it secured to itself the advantage of knowing that it could depend upon handling the fruit of appellants, the facilities of respondent being limited; that respondent also obtained the promise of payments; that there was a part performance and a part payment; that each party elected to act on the contract until a breach by respondent occurred. Appellants themselves, in analyzing the contract, put this query: "What fruit was required to be delivered

under the contract with appellants, the growers? What part?" and answered thereto, "part or all."

It would have been easy to have inserted in the contract a provision that appellants agreed to deliver all the fruit grown by them to respondent's warehouse at Brewster; or that they would deliver a certain number of boxes, or a certain portion of the appellants' crop of fruit for 1919.

There is nothing in the contract to that effect. All that appellants agreed to do, apparently they did do. Appellants agreed to have all fruit that was delivered packed in plainly marked boxes, with the grade, variety and sizes stamped thereon; they agreed to furnish the labels required to put on the boxes so delivered and warehoused; they agreed to give the warehouse written instructions twenty-four hours before loading cars with fruit so delivered; they agreed to pay the warehouseman seven and one-half cents per packed box for all apples so delivered to the warehouseman; they agreed to pay the warehouseman six cents per packed box for hauling apples so delivered and warehoused, from the orchard to the warehouse. All these things could be done with a very limited quantity of appellants' fruit grown during the year 1919, and fully comply with the contract.

On the other hand, as a test of the mutuality, what could respondent, if the situation were reversed, require appellants to do? There was nothing in this contract preventing the appellants from making other contracts with other warehousemen. Giving the contract the benefit of every doubt in its construction, when the growers delivered any part of the crop of fruit grown by them in 1919 to the warehouse, they fully performed their part of the contract. If they failed to deliver any part of their crop of fruit for

1919, it is difficult to see what remedy respondent would have against them. Nor do the allegations as to certain oral agreements and understandings in any way assist appellants in sustaining the contract. Evidence of an oral agreement made at the time or before the writing was made, to convert the contract into an obligation to deliver all of the fruit of appellants' 1919 crop, would be to vary and contradict a writing, and on this ground is incompetent. That is the uniform rule in this state, except for fraud, accident or mistake, and we need cite no cases to that effect. As was observed by Judge Lurton in *Dennis v. Slyfield,* 117 Fed. 474:

"Here both parties have signed the contract . . . It purports to be the agreement between the parties and speaks conclusively the conclusion to which the parties to it have arrived. The oral promise, if any, related to the subject upon which the written contract spoke and varied the terms of the writing in a most important particular. It was therefore upon a very elementary principle not competent to contradict the writing by an oral agreement contemporaneous with, or antecedent to it. All the negotiations prior to the writing are, in the absence of fraud, accident, or mistake, merged into the written agreement and it is not competent to prove such negotiations for the purpose of adding a term which would vary or contradict the conclusion arrived at as shown by the writing."

In the case above cited, there was a contract between the parties which recited that the second parties thereto were "desirous to ship by vessel certain lots of hard wood lumber," and by which the first party agreed to carry on its vessels, "any and all of this lumber as may be desired by the party of the second part," and this was held by Judge Lurton to be void for want of mutuality.

Our cases of *Mowbray-Pearson Co. v. Stanton Co.*, 109 Wash. 601, 187 Pac. 370, 190 Pac. 330; *Brown v. Brew*, 99 Wash. 560, 169 Pac. 992; *Taylor v. Ewing*, 74 Wash. 214, 132 Pac. 1009; *Herrin v. Scandinavian-American Bank*, 65 Wash. 569, 118 Pac. 648; *Spokane Canal Co. v. Coffman*, 61 Wash. 357, 112 Pac. 383; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381; *Nelson v. Brassington*, 64 Wash. 180, 116 Pac. 629, Ann. Cas. 1913A 289, and *Jennings v. Dexter Horton Co.*, 43 Wash. 301, 86 Pac. 576, are all applicable to this contract. The *Mowbray-Pearson Co.* case is very analogous to this case. In that case we said:

"Turning to the writing under consideration, we can find in it no obligation assumed by the respondent. By its terms the appellant promised, in consideration of the respondent's soliciting and delivering ice within a certain described district, it would sell the respondent sufficient ice at a named price to supply the district, but the respondent promised nothing. It neither promised to solicit and deliver ice in the district, nor promised, in case it did do so, to buy the ice it should sell from the appellant. The writing itself is therefore wholly unilateral. The promise is entirely upon the one side without any corresponding promise on the other."

In that case *Thayer v. Burchard*, 99 Mass. 508, was cited. That was a case where the defendants, operating a railroad, wrote to the plaintiffs, flour and grain dealers, that it would transport flour and grain between certain named places at $4 per ton, "this rate to continue in force until the close of navigation, unless notice to the contrary." The plaintiffs answered: "We accept the proposition." This was held to constitute a mere offer on the part of the plaintiffs and not an obligatory contract, because plaintiffs did not assume any obligation to furnish flour or grain for

transportation, being at liberty to buy flour or grain, or not, as they chose; or, if they did buy any, to transport it on a road other than that of defendant if they saw fit, and hence were not subject to an action for a breach of contract. This contract, it is true, obligates appellants to do certain things if they did deliver any fruit to respondent's warehouse. They did deliver fruit, and presumably (for there is nothing to the contrary shown) performed the things which they agreed to do in their contract. The same situation existed in the *Mowbray-Pearson Co.* case, *supra.* It was performed during one year by both parties, and performance refused the next year by one of them. Another similar case is that of *Missouri K. & T. R. Co. v. Bagley,* 60 Kan. 424, 56 Pac. 759, where the parties entered into a contract with the railway company wherein it was agreed that, if the parties would accept certain offers received by them from persons in Mexico for the purchase of corn, the railway company would transport the same from Mexico to Laredo, a point on the Mexican border, for a definite time, at a stipulated rate per hundred pounds. The quantity of corn to be purchased was about 7,500,000 pounds. The corn was purchased and something more than 3,100,000 pounds were shipped over the railway, and something more than 4,300,000 pounds remained, which the railway company refused to carry on the contract. The court held that the contract was not binding upon the railway company for want of mutuality, notwithstanding it had been nearly half performed, because the buyers of the corn were not obligated to ship over the line of railway.

We therefore conclude that the contract in question was void for lack of mutuality, notwithstanding it was partly performed, and the trial court was correct in

sustaining the demurrer and granting the judgment.

Judgment affirmed.

PARKER, C. J., FULLERTON, and BRIDGES, JJ., concur.

[No. 16444. Department Two. September 8, 1921.]

MARY BOWEN, *Respondent*, v. CHARLES RURY, *Appellant*.[1]

SALES (179-1)—CONDITIONAL SALES—ASSIGNMENT OF CONTRACT—EFFECT. An unconditional bill of sale by a conditional sales vendor to his vendee passes absolute title which is not divested by his subsequent assignment of the conditional bill of sale.

SAME (182)—REMEDIES OF SELLER—ELECTION—WAIVER OF RIGHT TO RETAKE PROPERTY. An action on a note secured by a conditional bill of sale is an election which waives the right to retake the property.

BILLS AND NOTES (60, 73-6)—ASSIGNMENTS—DEFENSES AGAINST BONA FIDE PURCHASERS—SET-OFF OR COUNTERCLAIM. Where a promissory note made in consideration of the sale of hotel furniture and fixtures has passed into the hands of a holder in due course, the maker cannot, in a suit upon the note by such holder, offset the value of a part of the furniture not owned by the payee, and of which the maker had been dispossessed at the suit of the true owner.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 28, 1920, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

W. B. Mitchell, for appellant.

Zent & Jesseph and *John M. Cannon*, for respondent.

MAIN, J.—This action is based on a promissory note. The cause was tried to the court without a jury and resulted in findings of fact, conclusions of law and a

[1]Reported in 200 Pac. 789.

judgment sustaining the plaintiff's right to recover. From this judgment the defendant, Charles Rury, appeals.

The facts are as follows: On October 8, 1919, Carney Swanson, being then the owner of the furniture and fixtures in a certain hotel or rooming house in Spokane, sold the same to the appellant upon a conditional sale contract. A part of the purchase price was represented by a note for $1,150, due on or before six months after date. The conditional bill of sale refers to this note and provides that, for the first six months, $25 per month shall be paid, and at the end of which time the entire amount shall become due. The note on its face is a straight obligation for $1,150, payable as stated on or before six months after October 8, 1919, which was the date upon which it was made and delivered. On the 9th day of October, 1919, or the day following the making of the conditional bill of sale and the note, Carney Swanson executed and delivered to the appellant an unconditional bill of sale which covered the property described in the conditional bill of sale, except that the lease to the building was not covered by the absolute bill of sale. On November 4, 1919, without recourse, Carney Swanson indorsed and delivered the note to one John Bachman, and at the same time executed and delivered to him an assignment of all her right, title and interest in and to the note and the "memorandum of conditional sale." On the first day of December, 1919, Bachman indorsed and delivered the note to the respondent, and on the same day executed and delivered to her an assignment of the conditional bill of sale.

The present action was begun on May 5, 1920, or more than six months after the entire amount of the note not then paid became due, not only by its terms,

but by the provision of the conditional bill of sale. Certain of the property that was covered by the conditional bill of sale, it developed subsequently, was not owned by Carney Swanson and was taken from the appellant in an action by the owner. In the present action, by his answer the appellant sought to offset the value of this property so taken from him against the amount due on the note. The trial court found, and the evidence sustains the finding, that the respondent acquired the note in due course of business, without notice or knowledge of any infirmities or equities against it and in good faith for a valuable consideration.

The question in the case is whether the appellant has a right to offset in this action against the amount due on the note the value of the furniture which was taken from him.

It is not necessary here to discuss or determine the question whether, when a conditional bill of sale is given for personal property and the purchase price is further evidenced by a promissory note, and the note is indorsed and the conditional bill of sale is assigned to a third party, in an action by such third party, the original maker of the note can plead an offset which would have been available to him had the note remained in the hands of the original holder. When the unconditional bill of sale was executed and delivered to the appellant by Carney Swanson, the title to the property there covered passed to him absolutely. The subsequent assignment referring to the conditional bill of sale from Carney Swanson to Bachman and from Bachman to the respondent cannot have the effect of divesting that title. The only effect of those assignments, so far as here material, would be to require a payment upon the note for the first six months at

the rate of $25 per month. The appellant, in his answer, alleged that Carney Swanson waived the conditional bill of sale when she gave the absolute bill of sale. The respondent, when she began this action, even if the conditional bill of sale had still been alive so far as it affected the title to the property, thereby elected to seek recovery for the balance due on the note as a debt and waived her right to retake the property. *State Bank of Black Diamond v. Johnson*, 104 Wash. 550, 177 Pac. 340. The title to the property having passed by the unconditional bill of sale, and six months having expired prior to the beginning of this action, the respondent had a right to maintain the action, and a defense against the note which would have been available to the appellant had it remained in the hands of the original holder was not available to him.

The judgment will be affirmed.

PARKER, C. J., MITCHELL, BRIDGES, and TOLMAN, JJ., concur.

[No. 16478. Department Two. September 8, 1921.]

MARIA DRAIN *et al., Appellants,* v. WILLIAM WILSON *et al., as Executors etc., Respondents.*[1]

TRUSTS (44-1)—COMPENSATION—CHARGES—COUNSEL FEES. Counsel fees incurred in necessary litigation will be imposed by equity upon a trust fund for the benefit of which litigation is successfully maintained, in all cases of good faith on the part of the attorneys rendering the service and of the parties employing them.

EXECUTORS AND ADMINISTRATORS (72, 76)—CLAIMS—ACCRUING DURING ADMINISTRATION. The statute of non-claim barring all claims not presented within six months after publication of notice to creditors of a decedent's estate has no application to a claim for legal services rendered the estate during the course of administration, whereby additional assets are discovered and added to the estate.

ACTION (29)—EXECUTORS AND ADMINISTRATORS (145)—DEFENSES—PREMATURE COMMENCEMENT. An action by heirs seeking to charge an estate with the expense of attorney's services in uncovering and increasing the assets of the estate is not prematurely brought, though antedating distribution under the testator's will.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered January 21, 1921, upon sustaining a demurrer to the complaint, dismissing proceedings in probate to ascertain and fix the amount of fees of attorneys employed by the heirs of an estate. Reversed.

Neill & Sanger, for appellants.

Dow & Dow and *Hanna, Miller & Hanna,* for respondents.

MITCHELL, J. — The amended complaint is substantially as follows: That the defendants, William Wilson and Ed. Maguire, are executors of and residuary legatees under the will of Patrick Drain, who died on April 6, 1919; that the deceased was a bachelor and

[1]Reported in 200 Pac. 581.

was not survived by father or mother, but by one sister, Maria Drain, nine nephews and nieces (names given), children of a deceased sister, Sarah Develin, and four other nephews (names given), children of a deceased sister, Nancy McErlain; that William Wilson was appointed by the superior court of Whitman county and qualified as administrator of the estate, and reported that the persons named were the heirs and only heirs of the deceased, and thereupon filed an inventory of the estate showing only, cash in bank $1,022.42, certificate of deposit in bank $7,500, liberty bonds $1,000, and mining stock and personal effects of no value; that, in October, 1918, Patrick Drain conveyed to William Wilson certain real property in Whitman county for which Wilson executed and delivered to Patrick Drain his promissory notes, not included in the inventory; that, after the inventory was filed, the heirs at law employed Messrs. Neill and Sanger, attorneys at law, to institute proceedings against Wilson to compel him to account for the promissory notes, and that, pursuant to said employment, proceedings were instituted in the superior court that finally resulted in a written settlement dated December 31, 1919, by which Wilson agreed to pay cash in the sum of $1,250, and execute his several notes in specified amounts, due at different dates, totaling $25,000, with interest at five per cent per annum, the notes to be payable to a trustee for the heirs and secured by a mortgage on the real estate sold to Wilson; that Wilson did execute the notes and mortgage, which were to be held by one Dow until the final decree of distribution was entered in the matter of the estate; that Wilson thereupon filed a supplemental inventory showing his notes in the sum of $25,000 and $1,250 cash; that in March, 1920, Wilson, as administrator, filed his final account and peti-

tion for distribution, showing property on hand consisting of cash, $7,313.55; liberty bonds, $1,000; and his own promissory notes in the sum of $25,000, secured by mortgage, setting out in the petition the names of the heirs as already given, and that thereupon the court fixed April 21, 1920, for the hearing, of which notice was duly given; that, on April 17, 1920, Wilson presented to the superior court a petition for the probate of an instrument purporting to be the last will and testament of Patrick Drain, deceased, which instrument was proved and admitted as such will; and by which will specific legacies were given to nominated persons in the total sum of $10,100, and all the residue of the estate was given to the executors in trust for designated purposes; that William Wilson and Ed. Maguire were named in the will as executors, were appointed as such by the court, qualified, and are acting as such, and that only two of the heirs of the deceased are mentioned in the will, to each of whom $1,000 is bequeathed; that, prior to the stipulated settlement with Wilson, there was no agreement between the heirs and Messrs. Neill and Sanger as to the amount to be paid for their services, but thereafter it was agreed by the heirs that, upon the distribution of the property, there should be assigned to Messrs. Neill and Sanger for their services the equal of $5,000 of the Wilson notes secured by the mortgage; that the plaintiffs and other heirs believed they were the only beneficiaries of the estate, at the time Messrs. Neill and Sanger were employed and rendered services as attorneys, without which the $26,250 would not have been discovered for the estate; that, after the appointment of Wilson as administrator, he gave due and proper notice to creditors, the first publication of which was on July 4, 1919, requiring claims to be presented within six

months, and that no other notice to creditors has ever been given in said estate; that plaintiffs, in October, 1920, before commencing this action, presented a duly verified claim in the sum of $5,000 to the executors, to be allowed out of the funds of the estate, for the services of Messrs. Neill and Sanger, and that the demand was rejected by the executors; that, in good conscience, the beneficiaries under the will, who would receive the benefits of the services of the plaintiffs through their attorneys, are chargeable with a reasonable sum as attorney's fee out of the funds made available by those services, and that those funds are now in the hands of executors under control of the court, as the probate proceedings under the will are still pending. The prayer is to ascertain the amount of a reasonable attorney's fee to be paid to plaintiffs for their attorneys, or to be paid direct to said attorneys, out of the funds brought into the estate, or for such other order or orders as may be equitable and just.

To the amended complaint, the defendants interposed a demurrer on the grounds, "(1) That it does not state facts sufficient to constitute a cause of action; and (2) that there is a defect of parties defendant, in that William Wilson and Ed. Maguire are now acting as executors only." The demurrer was sustained, and upon plaintiffs refusing to further plead, a judgment was entered dismissing the action, from which the plaintiffs have appealed.

The charge in the amended complaint is ample to merit compliance with the general rule that equity will impose the burden and expense of necessary litigation, including counsel fees, upon a trust fund for the benefit of which the litigation is successfully maintained, in cases of good faith on the part of the at-

torneys rendering the service and of the parties (representing themselves and all others benefited) employing such attorneys. *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 Pac. 647, Ann. Cas. 1912 C. 859; *In re Williamson*, 75 Wash. 353, 134 Pac. 1066; *Ford v. Gilbert*, 44 Ore. 259, 75 Pac. 138; *Campbell v. Provident Saving & Loan Soc.*, 61 S. W. (Tenn.) 1090; *Lamar v. Hall & Wimberly*, 129 Fed. 79; *Trustees v. Greenough*, 105 U. S. 725.

In the case of *Farmers' Loan & Trust Co. v. Green*, 79 Fed. 222, the circuit court of appeals states the rule as follows:

"There is no question as to the power of a court of equity, in cases of administration of funds under its control, to make such allowance to those who have instituted proceedings for the benefit of the fund as justice and equity may require. It is a well-recognized rule of equity that when a trust fund is brought into court for administration and distribution, it must bear the expense incurred in proper proceedings taken for the purpose. This expense necessarily includes the fees of the counsel who brings the suit, and who is considered as representing all persons having a common interest in the fund brought into court by it, and who avail themselves of its benefits, and of counsel who may be employed by authority of the court to perform services beneficial to the trust fund. *Trustees v. Greenough*, 105 U. S. 725; *Jacksonville, T. & K. W. Ry. Co. v. American Const. Co.*, 6 C. C. A. 249, 57 Fed. 66; *Bound v. Railway Co.*, 59 Fed. 509; *Insurance Co. v. Dellatorre*, 17 C. C. A. 310, 70 Fed. 643."

In the present case, proceedings were commenced by the heirs at law at a time when, by the record made by one of their present adversaries, they were, and two of them still are, vitally and legally related to the estate. That they represented not only themselves but all the creditors, known and supposed, is clearly indicated by the form taken in that litigation by which the

hidden assets were discovered for the benefit of the whole estate, and thereafter listed therein by Wilson, who at that time was acting as administrator, by a supplemental inventory as provided by the terms of the stipulated settlement in that controversy. There can be no question about the good faith of the heirs and their attorneys, nor that the institution of those proceedings enriched the estate to the extent of $26,250.

Respondents contend in support of the judgment that, as shown upon the face of the amended complaint, the claim of these appellants was barred because not presented within six months after the date of the first publication of notice to creditors. The recent case of *In re Hemrich's Estate,* 113 Wash. 667, 194 Pac. 569, is authority to the contrary. The cause for and rendition of the services involved in this controversy all happened after the death of Patrick Drain and while his estate was being administered in court. The claim here asserted is in the nature of an equitable lien upon the trust fund created after Drain's death, and the statute of non-claim is not applicable to it. That statute is no nearer applicable here than in the case of a mortgage creditor who is willing to confine his remedy to the property covered by his mortgage lien.

Respondents further contend that this suit has been prematurely brought. By that it is meant that, even if the appellants might have at some future time a right of suit for equitable contribution against the residuary legatees, they have no such right antedating distribution under the will. But this action is not alone against Wilson and Maguire as residuary legatees under the will. It is against them also in their capacity as executors under the will and who, under the control of the court and the terms of the will, are

representing all the beneficiaries, including the creditors. It is a suit appealing to the general powers of the superior court sitting in equity for the establishment of a lien upon, or a portion of, a fund created by the valuable services of the appellants through their attorneys, demand for the payment and recognition of which has been denied by the legal representatives and holders of that fund. There is no attempt to impress any of the rest of the estate with the claim, and certainly those who succeed to this particular fund and who are represented in this suit by the defendants as executors must take it subject to the superior claim of those who by their efforts have made it available. And upon the face of the complaint the appellants are fair. Seeking equity, they offer to do equity. Whatever may have been agreed on in the stipulated settlement of the prior suit as reasonable to be paid out of that fund by those who at that time were thought to be entitled to it as compensation to their attorneys, those same attorneys now ask by the bringing of this suit, as shown by the allegations of the amended complaint, that the compensation be now fixed in such amount as to the court shall appear to be just and reasonable. That course should be followed. The amended complaint states a good cause of action.

Reversed with directions to the trial court to overrule the demurrer.

PARKER, C. J., MAIN, BRIDGES, and TOLMAN, JJ., concur.

[No. 16147. *En Banc.* September 8, 1921.]

HARRY S. KING *et al.*, *Appellants*, v. SECOND AVENUE INVESTMENT COMPANY, *Respondent.*[1]

EVIDENCE (173)—PAROL EVIDENCE TO VARY WRITING—RELATION OF ORAL AGREEMENT TO WRITING. Where a broker's contract for a commission had alternative provisions, one in writing and one oral, which were not inconsistent, evidence of the oral stipulation is not contradictory of the written stipulation.

BROKERS (27)—CONTRACT OF EMPLOYMENT—COMPENSATION—RATE OR AMOUNT. Where brokers are employed under a written contract to procure a loan in a stated amount for principal and interest, and subsequently, under an oral contract, are instrumental in procuring the loan for a less sum at a greater rate of interest, their compensation is measurable at the same rate as provided in the written contract, in the absence of any alteration by the terms of the oral understanding.

MACKINTOSH, J., dissents.

Appeal from an order of the superior court for King county, Allen, J., entered May 22, 1920, granting a new trial, after the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Reversed.

Flick & Paul, for appellants.

Ballinger, Battle, Hulbert & Shorts, for respondent.

PARKER, C. J.—The plaintiffs, King and others, commenced this action in the superior court for King county, seeking recovery from the defendant investment company of compensation for services rendered in procuring a $300,000 mortgage loan upon its office building in Seattle. The trial in the superior court, sitting with a jury, resulted in a verdict awarding to the plaintiffs recovery in the full amount prayed for. Upon motion made in behalf of the defendant, a new trial was granted by the court and an order entered accordingly, from which the plaintiffs have appealed to this court.

[1]Reported in 200 Pac. 572.

By a recital in the order granting a new trial, specifically referring to the written opinion of the trial court announced at the time of entering the order, which written opinion is made a part of the record by being embodied in the statement of facts, it is made to appear that the granting of the new trial was by the superior court rested solely upon what it conceived to be error committed by it, as claimed by counsel for respondent, in receiving certain evidence and giving certain instructions, which had the effect of submitting to the consideration of the jury two inconsistent contracts for the payment of the compensation sought by appellants to be recovered; that is, in submitting to the consideration of the jury evidence of an oral contract, as it is claimed, tending to vary and contradict the terms of a written contract covering the same subject-matter. We do not understand counsel for respondent to seriously contend that error was otherwise committed by the trial court which would call for a new trial. In any event, we think there was no other error committed by the trial court which would warrant the granting of a new trial. So our inquiry is whether or not the trial court was warranted in granting a new trial because of its rulings submitting the case to the jury as above noticed. The trial judge, in the beginning of his opinion referred to in the order granting a new trial, said:

"The grounds urged in support of both motions (for new trial and judgment notwithstanding the verdict) are objections that appear primarily upon the face of the pleadings and are a renewal of timely objections made throughout the course of the trial."

It seems to us, as it evidently did to the trial judge, that the facts alleged in the complaint are practically all that need to be looked to in determining the question of whether or not respondent is entitled to a new

trial; since the case was tried and submitted to the jury upon the theory of the facts therein pleaded; their sufficiency to warrant recovery being challenged by demurrer, by answer, and by appropriate timely objections to the introduction of evidence, especially objections to the introduction of evidence to show an oral understanding between the parties in addition to that evidenced in writing. The claims of errors in giving the instructions also present the same question. The allegations of the complaint necessary to be here noticed, showing the theory upon which appellants prosecuted their case, are as follows:

"That on or about March, 1917, said plaintiffs were cooperating jointly to place loans in the city of Seattle and elsewhere, and that while so engaged, said defendant was seeking a loan in the approximate amount of $350,000 to be placed on its building in Seattle, known as the Railway Exchange Building.

"That said parties met, and during the course of the negotiations said defendant agreed to employ plaintiffs to assist in obtaining a loan for it, under terms in part expressed in a certain letter of direction or contract executed and delivered to one of said plaintiffs, George B. Riley, true copy of which follows:

" 'Mr. George B. Riley, March 23, 1917.
" '404 East Union St.,
" 'Seattle.

" 'Dear Sir: I have this day made an informal application for the loan of $350,000 to Mr. G. Wallace Simpson of Philadelphia as per your suggestion, and have sent him a complete statement of the earnings and expenses of the Railway Exchange Building covering from March 1st, 1916, to March 1st, 1917, and, if he will make this loan at 5% as applied for we will pay you a brokerage of 2½% commission.

" 'Yours truly,
" 'FRANK T. HUNTER,
" 'Sec. Second Ave. Inv. Co.
" 'Owners.'

"That while, at the time above referred to, the amount of said loan was fixed at $350,000, it was understood that it was doubtful as to whether the building would carry a loan of such an amount, and it was distinctly understood and orally agreed as a specific inducement thereto, that in the event that the party named in said letter or his associates were disclosed to said defendant, and a lesser amount than the loan suggested in said contract was finally accepted by said defendant, or if said loan might be somewhat changed in its other terms, that in that event, if the loan were still consummated through the parties disclosed by plaintiffs herein, said defendant orally agreed to and stated it would still be bound to pay the same rate of commission upon such loan as so altered, and that thereupon, and solely because of said inducement, said plaintiffs disclosed the name of said Simpson to said defendant.

"That said Riley accepted said contract in a representative capacity for himself and plaintiffs herein jointly, . . .

"That on or about July 17th, it became evident to plaintiffs and defendant that said G. Wallace Simpson could not obtain a loan of over $300,000, upon said building through or from the sources that he was dealing with, . . . That at said time an offer was communicated by said Simpson and by the said plaintiffs to said defendant to loan the amount of $300,000 at 5% on said building, correspondence to said effect being had directly between Simpson and said defendant, from which said defendant well knew, as it had known from the beginning, that the said Simpson was an independent broker acting as an intermediary between said second party and the said loaning sources . . .

"That said defendant delayed in accepting said proposition in several attempts to raise said amount to $330,000, in which attempt defendant sought and received the help of said plaintiffs.

"That from about August 31, 1917, and at the time when defendant knew that said Simpson could not induce his associates or his loaning sources, . . . to loan over $300,000 upon said premises, said defendant

kept urging plaintiffs to use their influence and exert effort to have said Simpson seek to have his source of loans grant a loan of $300,000, which plaintiffs agreed to do and did do.

"That on or about September 12, 1917, defendant practically closed a loan of $300,000 at 5½% through, and with the influence of the office of G. Wallace Simpson, of Philadelphia, the party mentioned in the contract already referred to in this complaint, and on or about October 25, 1917, fully closed said loan, and said Second Avenue Investment Company accepted same through said Simpson from the Metropolitan Life Insurance Company, all of which was accomplished through the efforts of plaintiffs in said matters, and by putting said defendant in touch with said party named in said writing and referred to in the oral understandings set out in this complaint.

"That, though repeatedly requested, defendant has refused to pay said sum or any part thereof, except the sum of $80 paid to said George B. Riley on September 20, 1917.

"Wherefore, plaintiffs pray judgment against said defendant in the sum of $7,420, with interest at the rate of 6% from October 25, 1917, together with their costs and disbursements herein legitimately to be taxed."

These allegations, it seems to us, evidence an intent on the part of appellants to claim recovery upon one contract, partly in writing and partly oral. If there had been a loan of $350,000 finally consummated by respondent as a result of the efforts of appellants, it might be true that the portion of the contract evidenced in writing would have been the only portion of it necessary for their recovery to rest upon. That, however, did not occur; but a loan of $300,000 was finally consummated by respondents as a result of the efforts of appellants, as alleged in the complaint and found by the jury. It seems to us of but little consequence whether we regard appellants' employment by

respondent as one contract, partly in writing and partly oral; or as two separate contracts, one in writing and the other oral. We are quite unable to see that there is any inconsistency of one part with the other, viewing the whole as one contract; or of one contract with the other, viewing them as separate contracts. The oral portion of the one entire contract viewed as such, and the separate oral contract viewed as such, was merely an alternative agreement prescribing the measure of appellants' compensation in the event a loan of less amount was consummated as the result of respondent's efforts. How can it be said that the two contracts, or the two portions of one contract, though concerning the same general subject-matter, are inconsistent or in the least tend to destroy each other, when it is manifestly intended by their terms that one is merely the alternative of the other, each to be controlling of the rights of the parties according as one or the other of two contemplated possible events may occur, it being plain that both cannot occur? We think this is one contract with alternative stipulations, one in writing and one oral, which are not in the least inconsistent, and that evidence of the oral stipulation is not contradictory of the written stipulation. The following authorities lend support to this conclusion: *Johnson v. McCart,* 24 Wash. 19, 63 Pac. 1121; *Welever v. Advance Shingle Co.,* 34 Wash. 331, 75 Pac. 863; *Elmendorf v. Golden,* 37 Wash. 664, 80 Pac. 264; *Potlach Lumber Co. v. North Coast Produce Co.,* 78 Wash. 533, 139 Pac. 496; 10 R. C. L. 1038.

It might well be argued, even had there been no specific oral agreement plead or proven, that appellants could have recovered compensation in the form of a commission measurable by the rate specified in the letter, computed upon the amount of the loan that was

finally procured by respondent as a result of appellants' efforts. However that may be, we see no escape from the conclusion that the pleading of, and proving to the satisfaction of the jury, the existence of such oral alternative agreement, and of the services of appellants rendered thereunder at the instance of respondent, entitle appellants to recover compensation measurable by the same rate of commission as upon a $350,000 loan. This conclusion finds support, in addition to the authorities above cited, in *Lawson v. Black Diamond Coal Mining Co.*, 53 Wash. 614, 102 Pac. 759, and *Peterson v. St. Francis Hotel Co.*, 61 Wash. 378, 112 Pac. 347. In the *Lawson* case, there was a commission agreement by which the plaintiff was to receive five per cent on a sale of the property of the mining company for $1,500,000. The plaintiff produced a purchaser who, upon direct negotiations with the mining company, finally purchased the property for $1,100,000, the plaintiff continuing his efforts to the last, looking to the bringing about of the sale, he being at no time discharged by the mining company. He sought recovery of five per cent commission computed upon the $1,100,000. Answering the contention made in behalf of the mining company that such sale was not one for which it had agreed to pay the plaintiff a commission, Judge Crow, speaking for the court, said:

"Appellant assails the amount of the commission or compensation awarded the respondents. The trial court allowed five per cent on $1,100,000, the selling price, with interest thereon from the date of sale. The record shows that at all times the contemplated commission was fixed on a five per cent basis. It is not disputed that the appellant actually agreed to pay five per cent on $1,500,000, in the event of a sale at that price. When it afterwards voluntarily reduced the selling price, the respondents were entitled to a ratable commission on such reduced price. In *Martin v.*

Silliman, 53 N. Y. 615, the second syllabus reads as follows:

" 'Where a broker, who is employed to sell property at a given price and for an agreed commission, has opened negotiations with a purchaser, and the principal, without terminating the agency or the negotiation so commenced, takes it into his own hands and concludes a sale for a less sum than the price fixed, the broker is entitled at least to a ratable proportion of the agreed commission.' "

We are reminded by counsel for respondent that the *Lawson* case was an action on *quantum meruit,* and to so show they refer us to the statement of the facts of that case made by this court upon a former appeal reported in 44 Wash. 26, 86 Pac. 1120, wherein it was stated that the complaint alleged "that the reasonable and agreed value of the services so performed is five per cent of the sum for which the said property sold, or $55,000." If that were an action to recover upon *quantum meruit,* it was also an action to recover upon a contract and a seeking to have the compensation measured by the terms of the contract. The above quotation from the decision finally rendered by this court we think plainly shows that the plaintiff was entitled to have it so measured. In the *Peterson* case, it does appear that the action was solely upon *quantum meruit.* The plaintiff was awarded recovery accordingly for a sum considerably less than he would have been entitled to, measured by his agreed commission; that is, he was not seeking and did not recover compensation measured by the agreed commission applicable to a higher price at which it was contemplated the property would be sold. A critical reading of that case renders it plain that had he claimed compensation measured by such stated commission he would have been entitled to recover accordingly, though the

price at which the property was ultimately sold was considerably less than that at which it was contemplated it would be sold when he took the agency for the sale of it. He was never discharged from his agency by the defendant, and apparently the defendant took over the negotiations and closed the sale itself at the less price. Judge Morris, speaking for the court, said:

"In undertaking to sell at a less price than the one given to respondent, and at other terms, it could not deprive respondent of the benefit of his contract. He was still entitled to his commission, to be determined by the terms of sale agreed upon between appellant and its vendee. *Lawson v. Black Diamond Coal Co.*, 53 Wash. 614, 102 Pac. 759. In this case the recovery sought was the reasonable value of the services. The respondent could, to that extent, waive his contract and recover the reasonable value of his services which, according to the testimony, is the amount fixed in the judgment, and the same is affirmed."

In view of the holdings in these cases, wherein there was not involved any express agreement as to the amount of compensation the agent should receive upon the sale being consummated at a less price than that originally contemplated, it seems to us there is little or no room for successfully arguing that appellants in this case are not entitled to recover as found by the jury.

It will be noticed in the above quotation from the trial court's opinion rendered upon the granting of the motion for a new trial, that respondent's motion for judgment notwithstanding the verdict was at the same time denied. We do not understand that counsel for respondent seriously contend here that it was entitled to a judgment of dismissal as a matter of law; that is, judgment notwithstanding the verdict. If, however, counsel for respondent deem that they have made such contention in their briefs filed in this court, we

deem it sufficient answer to say that we have carefully read all of the evidence found in the record as embodied in their abstract thereof and are fully convinced that respondent was not entitled to such judgment.

We conclude that the cause was properly submitted to the jury by the trial court; that it was error to grant respondent a new trial; and that judgment should have been entered upon the verdict. The order granting a new trial is reversed, and the cause remanded to the superior court with directions to enter judgment upon and in compliance with the verdict of the jury.

FULLERTON, MAIN, BRIDGES, HOLCOMB, and TOLMAN, JJ., concur.

MACKINTOSH, J. (dissenting)—The complaint in this action was founded upon a contemporaneous oral agreement. Testimony was introduced to establish such an agreement, and the trial court submitted the case upon that theory. On appeal, the case was presented upon an entirely different theory. Under the instruction of the court, the only possible theory upon which the jury was justified in returning a verdict was the finding by it that a contemporaneous oral contract had been entered into. The trial court was correct in granting a motion for a new trial for the reason that these instructions were improper.

The new trial also should have been granted for the reason that the court submitted to the jury a question which was for the court's determination, that is, it allowed the jury to construe the contract when it instructed the jury that, if it should find from the evidence that "the subject-matter of the discussion was fairly and clearly embodied in a written memorandum," such construction should affect its verdict. It

was a question of law as to whether the written contract required explanation or interpretation, and as to whether the subject-matter was fairly and clearly embodied. *Creagh v. Equitable Life Ass'n Soc.,* 19 Wash. 108, 52 Pac. 526.

The written agreement concerned a loan for $350,000 at five per cent interest, and allowed a brokerage for such loan. The oral contract provided for a less amount, was not limited as to the rate of interest, and contained a contingency providing for the disclosure of the name of the person lending the money. The oral contract covers the identical material provisions of the written contract and varies every one of them in every regard. The oral agreement is thus clearly in conflict with and varies the written contract. *Ross v. Portland Coffee & Spice Co.,* 30 Wash. 647, 71 Pac. 184; *Minnesota Sandstone Co. v. Clark,* 35 Wash. 466, 77 Pac. 803; *Newell v. Lamping,* 45 Wash. 304, 88 Pac. 195.

It is to be remembered that this is not an action to recover the reasonable value of the services rendered, which compensation the appellants would have been probably entitled to in a proper proceeding.

Nor does the evidence in the case entitle the appellants to a pro rata commission. The case of *Lawson v. Black Diamond Coal Mining Co.,* 53 Wash. 614, 102 Pac. 759, is clearly distinguishable from the case at bar, in that in the *Lawson* case the principal, without terminating the agency, took the matter into his own hands and concluded it at a sum less than the price fixed in the agreement, and on account of this action, which amounted to fraud, the agent was allowed a ratable proportion of the agreed commission. No such facts exist in the case before us. Furthermore, in the *Lawson* case it clearly appeared throughout the whole

transaction that a commission was agreed to be paid upon the selling price of the property. Had a loan been procured in the case at bar in the amount set out in the written agreement, and at the rate of interest there provided, and had the respondent then interfered and arranged for a lesser loan, the decision in the *Lawson* case would be perfectly applicable. The foundation of the *Lawson* case is that the agent is entitled to a pro rata commission when he has substantially complied with the terms of the contract, or where the owner has interfered with the transaction.

For the reasons that the case was tried upon an improper theory; that it was tried upon one theory below and another one here (see *O'Brien v. Griffiths & Sprague Stevedoring Co.*, 116 Wash. 302, 199 Pac. 291); and because the jury was improperly instructed, I am of the opinion that the action of the trial court in granting a new trial should be affirmed, and therefore dissent from the majority opinion.

[No. 16385. Department Two. September 8, 1921.]

ALICE M. WELKER, *Respondent*, v. FRANK A. WALLACE, *Appellant*.[1]

BREACH OF MARRIAGE PROMISE (3)—ACTION FOR BREACH—DEFENSES—DISEASE AS JUSTIFICATION FOR BREACH. In an action for breach of promise of marriage, justification on the ground of defendant's being afflicted with tuberculosis was not established by testimony that he had gone to Arizona on that account, in the absence of any showing that, at the time of the alleged breach of promise, he was afflicted with pulmonary tuberculosis in its advanced stages.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered May 13, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for breach of promise. Affirmed.

[1]Reported in 200 Pac. 561.

Sharpstein, Smith & Sharpstein, for appellant.

E. L. Casey, for respondent.

TOLMAN, J.—Respondent, as plaintiff, brought this action to recover damages for the breach of an alleged promise of marriage, and for the recovery of the purchase price of certain personal property. Appellant, as defendant, answered the first cause of action by general denials only, and the second cause of action by denials in part and an admission that there was due to plaintiff $67 as the unpaid purchase price for certain personal property, which amount, with costs then accrued, was tendered. Trial was had to a jury, which rendered a verdict against the defendant for $5,000 on the first cause of action, and $152 on the second cause of action. From a judgment on the verdict, the defendant appeals.

The principal contention here is that a new trial should have been granted because the verdict was contrary to the evidence and the law, in that there was testimony in the case, received without objection, to the effect that appellant was afflicted with tuberculosis, and that he was therefore justified in refusing to perform his engagement to marry, if, in fact, he had entered into any such engagement. Incidentally, certain instructions given are criticized because they do not submit this issue to the jury.

While ordinarily such a defense should be specifically pleaded, yet, assuming that this is a proper case in which to apply the rule that the pleadings should be considered amended to conform to the proof received without objection, still we fail to find anything in the record to indicate that such a defense was actually tendered in the trial court; or that the evidence upon that subject was sufficiently definite or complete to warrant the court in instructing thereon (if such in-

structions had been requested), or the jury in considering such evidence for any purpose. The only testimony upon the subject that is pointed out by counsel for either party, or which we are able to find in the statement of facts, is as follows: Appellant, being called as a witness in his own behalf, was, by way of introduction, asked as to his place of residence and occupation, and,

"Q. Where did you live before that? A. I lived in Michigan. . . . Q. Where to? A. Arizona. Q. Why? A. Tuberculosis. Q. Then you came from there to Umatilla county, did you? A. I came from there."

This was the only evidence offered by the appellant on this subject, and clearly, if the respondent's counsel had not added thereto by cross-examination, it would have been wholly insufficient to indicate that appellant had ever been afflicted with tuberculosis. On cross-examination the following only with reference to tuberculosis was brought out:

"Q. You went to Arizona on account of tuberculosis? A. Yes, sir. Q. You are not afflicted with that now, are you? A. The doctor gave me a week to live after I got there. Q. You didn't die, did you? A. I don't think so."

And while from this the jury might have drawn the inference that appellant was at one time afflicted with this disease, it can hardly be contended that all of this testimony, viewed in the light most favorable to appellant, would support a finding that, at the time of the alleged breach of promise to marry, appellant was "afflicted with pulmonary tuberculosis in its advanced stages", so as to be forbidden to marry by the statute, Rem. Code, § 7152 (P. C. § 3723), or that he was then afflicted with any disease in any stage which would render marriage improper or inadvisable.

The only other reference to tuberculosis which we find consists of respondent's statement that appellant never said anything about tuberculosis to her, and though it does appear that appellant underwent an operation during the time the engagement to marry was claimed to be in existence, yet there is nothing shown as to the nature of the operation or the reason why it was deemed necessary, and the jury could not properly be permitted to speculate upon the subject.

It is not contended that the evidence was insufficient to go to the jury upon the questions of the promise and the breach, and since, as we have seen, there was no sufficient evidence of justification, there is no ground upon which we can interfere.

Judgment affirmed.

PARKER, C. J., MAIN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 16436. Department Two. September 13, 1921.]

A. G. FORD, *Appellant*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS (65, 66)—EMPLOYEES—REMOVAL—CIVIL SERVICE RESTRICTIONS—REVIEW BY COURTS. Where a city has by its charter vested its officers with exclusive authority to discharge civil service employees on stating the "reasons therefor," without specifying what reasons are sufficient, such action of its officers is not reviewable by the courts.

Appeal from an order of the superior court for King county, French, J., entered November 30, 1920, in favor of the defendants, dismissing certiorari proceedings to review a decision of the civil service commission of Seattle confirming the action of the chief of police in discharging a member of the police force. Affirmed.

[1]Reported in 200 Pac. 568.

Walter S. Fulton and *R. L. Blewett*, for appellant.

Walter F. Meier, Nelson T. Hartson, and *Charles T. Donworth*, for respondents.

FULLERTON, J.—The appellant, Ford, was formerly in the employment of the city of Seattle as a member of its police force. On April 20, 1920, he was discharged from the force by the then chief of police, for the stated offense of offering to release from custody certain persons, whom he had arrested for gambling, on the payment to him of a certain sum of money. Later on the chief of police filed with the civil service commission of the city a statement in writing showing his reasons for the removal, as required by the city charter. Within ten days thereafter the appellant demanded an investigation by the civil service commission of the charges against him. That body complied with the demand and granted him a hearing at which evidence was taken in support and in opposition to the charges. At the conclusion of the hearing, the commission rendered a decision in which they confirmed and sustained the action of the chief of police. The conclusions of the commission were made matter of record on June 29, 1920, and later on, namely, on July 27, 1920, the appellant applied to the commission for a rehearing of the cause, basing his motion on newly discovered evidence, shown in affidavits filed with the application. The commission refused to reopen the cause, basing its refusal on the ground that it was without jurisdiction so to do.

On September 22, 1920, the appellant applied to the superior court of King county for a writ of review, seeking to have reviewed in that court the order of discharge of the chief of police and the confirmatory order of the civil service commission. A writ was granted by the court without notice, directed to the city of

Seattle, its civil service commission and its chief of police, as defendants, commanding them, on a day certain, to transmit the record of the proceedings to the superior court. On the return day, the defendants appeared by counsel and moved the court to quash the writ and dismiss the proceedings on the ground of want of jurisdiction of the subject-matter of the action and insufficient facts to constitute a cause for relief. The court sustained the motion on both of the grounds stated, and entered an order quashing the writ and dismissing the proceedings. From this order, the present appeal is prosecuted.

As the appellant points out, there is but one question presented by the record for the determination of this court, namely, did the trial court err in refusing to review the evidence on which the chief of police and the civil service commission acted in discharging the appellant from his position on the police force.

In our opinion, the question involved is controlled by our decision in the cases of *Price v. Seattle,* 39 Wash. 376, 81 Pac. 847; *King v. Listman,* 63 Wash. 271, 115 Pac. 93, and *State ex rel. Walcott v. Boyington,* 110 Wash. 622, 188 Pac. 777. In the first of these cases it appeared that the respondent, Price, was employed as a driver in the street department of the city of Seattle, and came within its classified civil service list of employees. He was removed from his position by the city superintendent of streets for insubordination, neglect and refusal to perform his duties. He demanded an investigation by the civil service commission of the causes assigned for his removal, and was granted a hearing, in which the order of the city superintendent of streets was confirmed. He then sought, by a mandatory injunction sued out in the superior court of King county, to be reinstated to his position with the

city. That court granted him the relief sought, but, on the appeal of the city, we reversed the judgment of the trial court, holding that the city charter of the city of Seattle vested the power of removal in the appointive officers of the city and that their action in that respect was final, and not subject to review by the courts except for the legal sufficiency of the reasons assigned. In the course of the opinion, after pointing out the distinction between statutes and city charters under which removals are held to be reviewable in the courts and those under which they are held not to be so reviewable, we used this language:

"In adopting the civil service system for the purpose of securing, and retaining in its employ, competent servants, we are of the opinion that the people of Seattle deemed it wise to impose no restrictions upon the power of removal, except a requirement that the reasons shall be stated in writing, and an investigation allowed by an impartial board of its own creation. In adopting a charter it was competent for the city to adopt the first rule above stated, which admits of a removal at pleasure and without cause, or the second, which only admits of a removal after a hearing and upon cause shown. In our opinion the city adopted a course midway between the two. It doubtless considered the requirement that the reasons for the removal should be stated in writing and made a matter of record a sufficient safeguard against improper removals, and an investigation by the civil service commission a sufficient protection to the discharged employee. Whether such provisions are wise or unwise is not for the consideration of this court. Where the system extends to a large number of employees, the right of every discharged employee to resort to the courts would doubtless impair, in a measure, the usefulness and efficiency of the system itself. In any event, we do not think that the framers of the charter ever intended that the courts should be resorted to in such cases. When, therefore, the appointing power files with the civil ser-

vice commission a statement in writing showing good and sufficient reasons for the removal, and after investigation the commission confirms the action of the appointing power, the removal is complete, and any further appeal must be to public opinion. *Kimball v. Olmsted,* 20 Wash. 629, 56 Pac. 377; *State ex rel. Gill v. Byrne,* 31 Wash. 213, 71 Pac. 746." *Price v. Seattle,* 39 Wash. 376, 81 Pac. 847.

In the second case, it appeared that the city of Seattle temporarily increased its police force, and assigned one King to the captaincy of one of the three squads into which the temporary force was divided, he then being a sergeant upon the regular force. On the discharge of the temporary force, King was ordered by the chief of police to report for duty as a sergeant. He refused to so report, whereupon the chief of police entered an order discharging him from the police force. He thereupon demanded an investigation by the civil service commission on the legality of the order. This was granted, and on the hearing the order of the chief of police was sustained. The discharged officer sought to review the action of the officer and the commission by a writ of review sued out of the superior court. There, as here, the court on motion quashed the proceedings and dismissed the action. On the appeal to this court the following language was used:

"The appellant contends that there was no sufficient legal reason assigned for the order of the chief of police of December 2, 1909, by which he undertook to reduce the appellant from the rank of captain to that of a sergeant of police, and hence the order of the civil service commission is reviewable in the courts, under the authority of *Price v. Seattle,* 39 Wash. 376, 81 Pac. 847. But we think there was a sufficient legal reason. The office of captain, which he was filling, was a temporary creation, and expired by its own limitations upon the day he was ordered to report for duty as a sergeant. The appellant, by reason thereof, and by operation of

the police regulations, resumed his former relations to the police department. He was thus subject to be assigned a duty in his resumed relation, and when he refused to perform that duty could be dealt with for insubordination. The reasons assigned for the removal being legally sufficient, the court will not inquire into the facts. The order appealed from is affirmed." *King v. Listman,* 63 Wash. 271, 115 Pac. 93.

The third of the cited cases was an appeal from an order of the superior court refusing to review an order of the civil service commission of the city of Spokane in which that body dismissed an employee of the city serving in the fire department. The judgment of the trial court was affirmed, Judge Parker, speaking for the court, saying:

"The city, by its charter, can create a tribunal with power to finally decide the question of whether or not a city employee shall be dismissed from, or retained in, the service of the city. Now this is what the city of Spokane, by its charter provisions above quoted, has done. It has not only given to the civil service commission the power to decide questions of fact, that is, as to what acts have been committed by an employee which are sought to be shown as grounds for his dismissal, but also the question as to whether or not the particular acts drawn in question constitute sufficient cause for the dismissal of an employee. It is to be noted that the charter provisions above quoted only require that the order of suspension shall state the *'reasons therefor.'* Nothing is specified in the charter as to what are, or what are not, sufficient reasons for the suspension of an employee by the head of the department, or for his final dismissal by the civil service commission. It would seem, therefore, that the question as to what acts are, and what are not, sufficient to warrant the dismissal of an employee is a question to be decided by the civil service commission, just as the question of whether or not such cause exists in fact is to be decided by the civil service commission."

State ex rel. Wolcott v. Boyington, 110 Wash. 622, 188 Pac. 777.

These cases, as we say, control the question now before us. They announce the rule that a city has power to vest in its officers exclusive authority to discharge and dismiss employees of the city, and that the city of Seattle has, by its charter, exercised the power. The trial court, therefore, did not err in holding that it was without jurisdiction to review the evidence on which the dismissal of the appellant was based. The judgment will stand affirmed.

PARKER, C. J., MAIN, MITCHELL, and TOLMAN, JJ., concur.

[No. 16397. Department One. September 13, 1921.]

IDA AUSTIN, *Appellant*, v. W. C. WALLACE, *Defendant*, FARMERS' MARKET, *Respondent*.[1]

ASSIGNMENTS (23)—SET-OFF AND COUNTERCLAIM (16)—ASSIGNED CLAIMS—LIABILITIES OF ASSIGNOR TO THIRD PERSONS. Under Rem. Code, § 191, providing that any debtor may plead a set-off against an assignee, if held by him against the original owner, a corporation to whom a debtor had loaned money less than the amount of his debt may credit the amount of the loan and offset the debt against a garnishment notwithstanding the bank's claim had been assigned to a third person for collection.

GARNISHMENT (32-1) — EXTENT OF LIABILITY OF GARNISHEE. A garnishor can acquire by the garnishment no greater rights in property than the debtor had at the time of garnishment.

ASSIGNMENTS (24) — EQUITIES AND DEFENSES BETWEEN PARTIES — ESTOPPEL. The rule that, after assignment of a non-negotiable chose in action, the assignor has no right to collect the chose, and if he does so, the money will be held as a trust fund belonging to the assignee, has no application except as between assignor and assignee.

GARNISHMENT (15-1)—PROPERTY ASSIGNED FOR COLLECTION. A fund collected by an assignor after assignment thereof to a third person for the purposes of collection, cannot be garnished as the property

[1]Reported in 200 Pac. 566.

of the assignor, where the assignor was entitled to offset the amount and was not in fact indebted to the judgment debtor.

ABATEMENT AND REVIVAL (2) — GARNISHMENT (38) — ANOTHER ACTION PENDING—NATURE OF ACTION. The defense of another action pending, under Rem. & Bal. Code, §§ 259, 261, providing that an item of account already the basis of a pending suit cannot be interposed as a set-off or counterclaim in another action is not available in the case of a garnishee defendant brought into court to show its indebtedness to defendant; hence such garnishee, though it has an action pending against the principal defendant on the claim for which it is garnished, may set up the payment of such claim as a defense.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered November 30, 1920, upon findings in favor of the garnishee defendant, after a trial to the court on the merits. Affirmed.

Louis A. Dyar, for appellant.

King & Kerr, for respondent.

HOLCOMB, J.—This case involves the liability of a garnishee defendant. In the original action, Ida Austin, as plaintiff, against W. C. Wallace, as defendant, who was the former manager and a stockholder of the Farmers' Market, a corporation, sought to recover the sum of $301.35. A writ of garnishment was sued out against the Farmers' Market, a corporation. It answered, admitting that the defendant Wallace was the owner of certain shares of stock in the company, and alleged further that, at the time the writ was served, to wit, July 23, 1920, it was not indebted to Wallace in any sum whatsoever. The answer of the garnishee defendant was controverted by the plaintiff, who alleged on information that the garnishee defendant was in fact indebted to the defendant in the sum of $1,000 and interest, according to the terms of a promissory note. A trial being had on the issues so formed, the trial court discharged the garnishee defendant as not indebted to the defendant Wallace.

Wallace had, for some time prior to June 23, 1920, been the manager of the Farmers' Market, and during that time had a personal account on the books of the market. He also apparently misappropriated money and chattels of the company. On April 1, 1920, the Farmers' Market borrowed from Wallace $1,000 and gave him its note therefor, payable June 1, 1920. The stated account between respondent and Wallace was agreed between the parties hereto by the following stipulation:

"It is hereby stipulated for the purposes of this case only that the following is a true statement of the account of the said W. C. Wallace with the said Farmers' Market at the date of the service of the writ of garnishment herein upon the said Farmers' Market:

Balance Dec. 31, 1919, $143.20	$143 20
Jan., 1920, groceries from Govan Branch	11 10
June 17, 1920, one dog	10 00
June 23, 1920, check to "J. F. Hopkins" cashed by Austin	350 00
June 23, 1920, cash taken from company's safe	825 00
June 30, 1920, sundry cash taken during June	73 00
July 12, 1920, cash debit, ticket in till	20 00
July 12, 1920, balance due from Charles Watson	9 67
Total debits	$1,941 97
Credits.	
June 30, 1920, salary June 1 to 25	$110 00
July 3, 1920, refund by Austin for proceeds irregular "J. F. Hopkins" check	350 00
July 12, 1920, cancellation of Wallace loan to Company	1,000 00
Total Credits	$1,460 00
Balance due from W. C. Wallace:	
July 12, 1920	$481 97

"That in addition to said account there was at that time owing to Farmers' Market from said W. C. Wallace, the following items, being for merchandise of said Farmers' Market appropriated by said Wallace. . . . Total $264.40.

"That said Ida Austin reserves the right to challenge the legal effect of the assignment of Farmers' Market to John A. Williams, as it may pertain to the foregoing items, or to the suit of the Farmers' Market vs. Ida Austin. And to challenge said account by reason of any item therein being included in suit against Ida Austin."

On July 1, 1920, respondent assigned its claims and demands against Wallace to J. A. Williams for collection only. According to the agreed statement of account, a credit of $1,000 in cancellation of the Wallace note by the company was entered upon its books July 12, eleven days before the service of the writ of garnishment in this case upon respondent.

Appellant seeks to hold the garnishee defendant upon the theory that respondent was not entitled to credit the amount of the note and interest as payment upon the account subsequent to the date of assignment by respondent of its balance of account against Wallace to Williams.

It is clear that if respondent had the right to credit the amount of the Wallace note of $1,000 against the amount due from Wallace to it, after the assignment by respondent to Williams, then respondent was not indebted to Wallace at the time of the service of the writ of garnishment.

Section 191, Rem. 1915 Code (P.C. §8272), provides:

"Any assignee or assignees of any judgment bond, specialty, book account, or other chose in action for the payment of money by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action

or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned: *Provided,* That any debtor may plead in defense a counterclaim or an offset, if held by him against the original owner, against the debt assigned, etc. . . ."

Under the statute, there is no doubt that, had Williams, the assignee of respondent, brought suit for collection against Wallace of the amounts claimed to be due respondent, Wallace would have had the right to offset his $1,000 note and interest, and that would have been a *pro tanto* defense to the amount thereof against Williams as assignee of respondent.

It is the general rule that the assignee of a non-negotiable chose in action normally takes it subject to all equities and defenses which could have been set up against it in the hands of the assignor at the time of the assignment. 2 R. C. L. § 39, p. 629. Furthermore, the garnishor can acquire by its garnishment no greater rights in property than the debtor had at the time of the garnishment.

Appellant relies on the rule of estoppel, citing 5 C. J. p. 967, to the effect that, as against the assignor in general, the assignee becomes the owner of the chose from the time of the assignment, subject to the qualifications heretofore stated. That the assignor has no right to collect the chose, nor in any way to discharge the debtor therefrom, nor to modify the chose as by an extension of time to the debtor. That if, therefore, the assignor does collect the chose, the moneys in his hands arising therefrom will be held as a trust fund belonging to the assignee. That rule has no application except as between the assignor and the assignee.

Under the facts as shown by the stipulated account

in this case, there can be no doubt that the garnishee defendant was not indebted to Wallace when the writ of garnishment was served on it. On the other hand, Wallace was indebted to it.

Appellant also contends that any item or cause of action already the basis of a pending suit cannot be used as a set-off or counterclaim, citing Rem. & Bal. Code, §§ 259 and 261 (P.C. §§ 8346, 8348), and claims that, since the garnishee defendant had already brought an action against Wallace to recover the entire sum of $1,345, not crediting the Wallace $1,000 note and interest, and another against this plaintiff to recover the proceeds of a $500 check, it had no right to set up the amount of the note and interest in this suit. *Caine v. Seattle & Northern R. Co.*, 12 Wash. 596, 41 Pac. 904, is cited by appellant as conclusive. In that case it was held that the statute giving the defendant the right by demurrer or answer to raise the defense that there is another action pending against the same parties for the same cause, an objection may be interposed by the plaintiff to a counterclaim set up by the defendant, inasmuch as in such pleading the plaintiff occupies the position of defendant. That case does not apply to this situation. In this case the garnishee defendant is not the defendant, and it is brought into court to show whether it is indebted to the defendant. It has not by its answer caused a multiplicity of actions. It is setting up an account wherein it is shown that, instead of its being indebted to Wallace, Wallace is indebted to it, and it is, therefore, not subject to garnishment. It is no concern of appellant in this case whether respondent is attempting to recover more than it is entitled to in its action against Wallace. It is to be presumed that the facts will be shown to the trial court before judgment is entered in the other actions, and that no

more than respondent is entitled to will be awarded to it.

We find no error, and the judgment of the trial court is affirmed.

PARKER, C. J., FULLERTON, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16335. Department Two. September 13, 1921.]

RAGNHILD SCHOBLOM, *Respondent*, v. HUGO A. SCHOBLOM, *Appellant*.[1]

TRIAL (25)—RECEPTION OF EVIDENCE—NUMBER OF WITNESSES—DISCRETION OF COURT. It is not an abuse of discretion to limit the number of defendant's witnesses to four or five in an action for divorce on the ground of cruelty, where the testimony of the witnesses excluded would not have been addressed to a direct refutation of plaintiff's charges, but would have been confined to the fact that they had seen nothing wrong in the conduct of defendant.

NEW TRIAL (8)—PREJUDICE OF JUDGE—TRIAL DE NOVO. A divorce action being triable de novo on appeal, the fact that the trial judge may have been prejudiced against appellant affords no ground for awarding a new trial.

Appeal from a judgment of the superior court for King county, Ronald, J., entered August 2, 1920, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

Thos. R. Horner, for appellant.

Carl J. Smith, for respondent.

MAIN, J.—This is a divorce action. In the complaint the plaintiff made certain specific charges of cruelty against her husband, the defendant. In the answer these charges were denied. The trial resulted in findings of fact, conclusions of law and a judgment

[1]Reported in 200 Pac. 579.

sustaining the plaintiff's right to a divorce. The defendant appeals.

The appellant first complains that, upon the trial, he was not permitted to offer the testimony of all the witnesses who had been subpoenaed to testify in the case. Of approximately the twenty-eight witnesses which he had subpoenaed, the court received the testimony of only four or five. When the respondent was upon the stand testifying in her own behalf, and during the cross-examination which was somewhat extended, the trial court became aware of the number of witnesses that was likely to be offered by the respective parties, and especially by the appellant, and indicated some impatience at the slow progress of the trial and the length of time it would take if the testimony of all the witnesses was heard. After three witnesses had been sworn and testified in behalf of the respondent in addition to her own testimony, the trial judge announced that he would not go further into the respondent's case at that time but would hear from the defense. After four or five witnesses had testified for the appellant, the court announced that he did not care to hear further testimony. The appellant's counsel advised the court at the time that there was a large number of witnesses present who were acquainted with the parties and that they had not seen anything wrong in the conduct of the appellant. Subsequently a motion for a new trial was made, supported by an affidavit of the appellant in which was briefly detailed facts which the witnesses present in court on the day of the trial but not heard would have testified to had their testimony been taken. These witnesses, generally speaking, were friends and neighbors, and their testimony would have been generally to the effect that the appellant was of a kindly disposition and that they

had never observed or heard that there was any domestic infelicity between the parties. The respondent had supported her specific charges of cruelty by direct testimony other than that of herself.

Reversal of the case is sought because the trial judge declined to hear the witnesses subpoenaed by the appellant.

The rule in such cases is as stated in *Johnsen v. Johnsen,* 78 Wash. 423, 139 Pac. 189, 1200, that the trial court may, in the exercise of a discretion, limit the number of witnesses that may be called upon a particular issue, but that this discretion does not clothe the court with arbitrary power to deny a litigant the right to offer testimony which reasonably tends to support his theory of the case or disprove the theory of his adversary. Applying this rule to the facts in the present case, it cannot be said that the trial court abused its discretion and acted in an arbitrary manner in declining to hear all the witnesses subpoenaed by the appellant to testify in his behalf. The testimony of these witnesses, as indicated by the affidavit, would have been negative in character and was not testimony which would have directly refuted the charges made in the complaint and which was supported by the testimony offered by the respondent.

It may be added that, in our opinion, had the court heard the testimony of the witnesses as it is set out in the affidavit, the result of the trial could not have been different. The case is tried here *de novo,* and considering the facts stated in the affidavit, together with all the testimony in the case, it seems to us that the respondent was entitled to prevail.

The appellant also complains that he did not have a fair trial because the judge before whom the case was tried was prejudiced against him, as indicated by

the remarks made during the progress of the trial. These remarks, however, we think do not show that the trial judge was prejudiced for or against either party to the suit. And even though he were, this would not necessarily be a reason for granting a new trial in the case, which is heard here *de novo*. It would serve no useful purpose to set out in detail the facts bearing upon the domestic infelicity of the parties to this action. It is sufficient to say that the trial judge did not abuse his discretion and act in an arbitrary manner in declining to hear all of the appellant's witnesses, and that the judgment entered was such as it should have been. Affirmed.

PARKER, C. J., MITCHELL, BRIDGES, and TOLMAN, JJ., concur.

[No. 16348. Department Two. September 13, 1921.]

ERIC G. ANDERSON, *Appellant*, v. GEORGE J. BAUER *et al.*, *Respondents*.[1]

MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT. Rem. Code, § 6604-3, gives a workman entitled to industrial insurance the election to take under the act, or sue third persons, for injuries occurring "away from the plant."

JUDGMENT (54)—TRIAL (60)—NOTWITHSTANDING VERDICT—POWER OF COURT. A motion for judgment non obstante veredicto must be based solely on matters appearing in the record, and cannot be supported by affidavit.

SAME. In an action for damages by a workman injured away from his employer's plant, the fact of his prior election to claim under the workmen's compensation act is not a jurisdictional question which may be determined on motion for judgment non obstante veredicto without a showing of the election appearing upon the record.

Appeal from a judgment of the superior court for King county, Jurey, J., entered June 24, 1920, in favor

[1]Reported in 200 Pac. 576.

of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

Russell & Blinn, for appellant.

Morris B. Sachs, for respondents.

MAIN, J.—The plaintiff brought this action to recover damages for personal injuries for which he claims the defendants are liable. The cause was tried to the court and a jury, and resulted in a verdict in the sum of $1,800. Motions for judgment notwithstanding the verdict and for new trial were duly made. The motion for judgment notwithstanding the verdict was sustained and a judgment entered dismissing the action. The plaintiff appeals.

On December 30, 1919, the appellant was employed by the Seattle and Rainier Valley Railway Company, a corporation, and was engaged in repairing the track of that company where it crosses the tracks of another street car line at the junction of Westlake avenue and Fourth avenues in the city of Seattle. While so employed, he was struck and injured by an automobile operated for and on behalf of the respondents, George J. Bauer and wife. The respondent, Mutual Union Insurance Company, had bonded the owners of the automobile, who were engaged at the time of the accident in transporting passengers for hire. The accident happened away from the plant of the Seattle and Rainier Valley Railway Company. Near the close of the taking of the testimony in the case, the respondent called the appellant to the witness stand and inquired of him whether he had filed a claim with the industrial insurance commission, and received an affirmative reply. The evidence did not disclose, however, whether the claim was filed prior to the time the present action

was instituted. Under the holding in *Carlson v. Mock*, 102 Wash. 557, 173 Pac. 637, if the accident happened away from the plant, the respondent had an election of remedies. He could pursue his common law action for damages, or he could file a claim and take under the industrial insurance act.

It will be assumed, but not decided, that, if the claim was filed prior to the institution of the action, that would constitute an election and the action could not be maintained. When the motion for judgment notwithstanding the verdict came on for hearing, the respondent presented a transcript of the proceedings before the industrial insurance commission, certified by the secretary of that commission, by which it is claimed the fact appears that the claim was filed prior to the institution of the present action. The question in the case is whether the appellants had the right, upon the hearing of the motion for judgment notwithstanding the verdict, to prove a fact which if true would show an election, but which did not appear in the record at the time the cause was submitted to the jury. The rule is that a judgment notwithstanding the verdict must be based solely upon matters appearing in the record, and it cannot be granted upon affidavit. In 11 Ency. Plead. and Prac., p. 917, it is said:

"A judgment *non obstante veredicto* must be based solely upon matters appearing upon the record. It cannot be granted upon affidavit."

The transcript of the proceeding before the industrial insurance commission would perform the same function as an affidavit in establishing a fact, upon the hearing of a motion, which did not appear in the record. The force of this rule is sought to be avoided by an argument to the effect that the question was one of jurisdiction and that this fact could be made to ap-

pear at any time, and when it did appear, it would become the duty of the court to dismiss the action. This apparently was the theory of the trial court, because in the judgment of dismissal it is recited that the motion for judgment notwithstanding the verdict is granted and the case is dismissed for want of jurisdiction. The question is not one of jurisdiction, but one of election of remedies. The appellant had the right to maintain the action, unless he had made a prior election under the holding in the *Carlson* case. This was a fact to be determined, and if established by the record before the case was submitted to the jury, the motion for judgment notwithstanding the verdict would have been properly granted, not on the ground of lack of jurisdiction, but on the ground that the appellant had made a prior election and therefore had no right to maintain the action.

The judgment will be reversed, and the cause remanded to the superior court with direction to pass upon the motion for new trial.

PARKER, C. J., MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

[No. 16613. *En Banc.* September 13, 1921.]

MAX MAXIMILLIAN, *Appellant*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*[1]

BOUNTIES — PERSONS ENTITLED — STATUTES — CONSTRUCTION. The soldiers' bonus act (Laws 1920, Ex. Sess., p. 7) providing for payment of equalized compensation to veterans of the war with the central allied powers who "were regularly called, enlisted, drafted, inducted or commissioned, and commissioned and who served on active duty between April 6, 1917, and November 11, 1918," contemplates payment to those only who were residents of the state and who between April 6, 1917, and November 11, 1918, abandoned the material advantages of civil life during such period to aid in the defense of their country.

ON REHEARING.

STATUTES (9)—EFFECT OF PARTIAL INVALIDITY. The fact that the soldiers' bonus act (Laws 1920, Ex. Sess., p. 7, § 1) can be construed by its language as including payments to persons not entitled thereto does not render the act inoperative as to those who are entitled to its benefits.

BOUNTIES — PERSONS ENTITLED. Under the soldiers' bonus act (Laws 1920, Ex. Sess., p. 7, § 1), any bona fide resident of the state who entered the military or naval service of the United States, abandoning civil life for the purpose of aiding the nation and the state in the emergency of the war with the central allied powers during the period between April 6, 1917, and November 11, 1918, and was actually on active service during such period, is entitled to the bonus, regardless of the time of entry in such service, if such entry resulted in the abandonment of the material advantages theretofore enjoyed by him in civil life.

SAME—DUTIES OF STATE AUDITOR. It being the duty of the state auditor to pass upon application for a soldiers' bonus, when he determines the facts entitling the applicant to compensation, he must allow the same regardless of the time of entry into the service.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered June 10, 1921, in favor of the defendant, dismissing mandamus proceedings to compel the state auditor to pay a claim against

[1]Reported in 200 Pac. 583; 203 Pac. 379.

the veterans' compensation fund, after a hearing on the merits. Affirmed.

Philip Tworoger, for appellant.

The Attorney General and *John H. Dunbar, Assistant* (*John A. Frater,* of counsel), for respondent.

PARKER, C. J.—The plaintiff, Maximillian, having served in the army of the United States during the late world war and deeming himself entitled to compensation from the state of Washington under our veterans' equalized compensation act (being ch. 1, p. 7, of the Laws of 1920, Extraordinary Session of the Legislature) made application accordingly to the state auditor. His application having been denied by the auditor, he sought by mandamus proceedings in the superior court for Thurston county to compel payment in accordance with his application. A hearing in the superior court upon the merits resulted in a judgment of dismissal, denying the relief sought by the plaintiff, from which he has appealed to this court.

The controlling facts are not in dispute, and may be summarized as follows: On November 4, 1914, which date, it is to be noticed, was long before the United States entered the world war, and at a time when the United States was at peace with all the world, appellant enlisted in the military service of the United States, at Jefferson Barracks, in the state of Missouri. At that time he was not a resident of the state of Washington; indeed, he had then never been in the state of Washington. His certificate of discharge from the military service of the United States, introduced in evidence in his behalf, does not show the term for which he enlisted; that certificate showing only the date of his enlistment as November 4, 1914, the date of his discharge as June 4, 1920, and that he

was "serving in second enlistment period at date of discharge." Touching the question of the term of his enlistment commencing on November 4, 1914, and as to whether or not there was another enlistment by him at a later time when he claims to have become a resident of the state of Washington, he testified as follows:

"Q. When did you enlist in the army? A. November fourth, 1914. Q. And after your enlistment, where were you stationed? A. At Jefferson Barracks until December, 1914. Q. Where were you sent from Jefferson Barracks? A. Fort Casey, Washington. Q. How long were you stationed at Fort Casey? A. From—until I left for France sometime in 1918. Q. How long was your enlistment for? A. Three years with the colors and four in reserve. Q. And when you lived at Fort Casey you lived in barracks, didn't you? A. Yes. Q. All the time that you were there you lived in barracks? A. Yes. Q. In 1917 you did not re-enlist, did you? A. No."

His service in the army was continuous from his enlistment in 1914 until his discharge in 1920, he evidently being retained and continued in the service under his reserve period of enlistment mentioned in his testimony. We think it is thus apparent that the reference in his certificate of discharge to his at that time "serving in second enlistment period" is merely a reference to the reserve period of his enlistment, and does not, in the light of his testimony, evidence a new or independent enlistment. He claims to have become a resident of the state of Washington prior to the commencement of his reserve period of enlistment, and evidence was introduced in his behalf in an effort to show the establishment of his residence in this state before that time, with a view of inducing the court to hold that his reserve period was, in legal effect, a new enlistment during the war, while he was

a resident of this state. We do not here notice the evidence touching the claimed establishment of his residence in this state, since we have concluded that his residence is of no controlling force in the disposition of his claimed right here involved, in view of the fact that his enlistment was in the regular army of the United States long before our country entered the world war.

The language of the title and body of our veterans' equalized compensation act to be here considered is as follows:

"An Act providing for the payment of equalized compensation to veterans of the war with the Central Allied Powers, authorizing the issuance and sale of state bonds and the levy of a tax to pay said bonds, making an appropriation, providing penalties, and providing for the submission of this act to a vote of the people.

"*Be it enacted by the Legislature of the State of Washington:*

"Section 1. There shall be paid [1] to each person who was regularly called, enlisted, drafted, inducted or commissioned and who served on active duty in the Army, Navy or Marine Corps of the United States between the 6th day of April, 1917, and the 11th day of November, 1918; [2] and to each person who, being a citizen of the United States at the time of his entry therein, served on active duty in the naval, military or air forces of any of the governments associated with the United States during the war with the central allied powers between the 6th day of April, 1917, and the 11th day of November, 1918; [3] and who, at the time of his call, enlistment, induction, commission or service, was a *bona fide* resident of the state of Washington, the sum of fifteen dollars ($15.00) for each and every month or major fraction thereof of active duty performed subsequent to April 6, 1917, and prior to November 11, 1919: . . ." Laws of 1920, p. 7, ch. 1.

We have, for convenience of separate reference, numbered the three parts of this quoted language of the body of the act which are separated by semicolons. The second part seems to be of no moment in our present inquiry. The first part, read without thought of the word "service," found in the third part, seems to plainly limit the right to "equalized compensation" to those who were "called, enlisted, drafted, inducted or commissioned" within the specified war period and who "served" within that period. In other words, a claimant must have *entered the service within that period,* as well as *performed the service within that period,* in order to entitle him to the compensation provided for by the act. We think the words "equalized compensation," found in the title of the act, shed light upon the legislative intent to be gathered from the language of the body of the act which might seem somewhat uncertain in its meaning. The word "service," in the third part of the quoted language of the act, being separated by the disjunctive "or" from the words "called," "enlisted," "drafted," "inducted," "commissioned," may seem to furnish ground for arguing that mere service in the world war by a resident of this state, regardless of the time or manner of entering the military service, would entitle such resident to the compensation provided for by the terms of the act. We think, however, that such is not the meaning of the act, in view of the language of its title and the first part of the above quoted language of the body of the act. When appellant entered the military service of the United States he voluntarily chose such service as a vocation, at a time when there was no law under which he could be compelled to enter such service, and at a time when the nation was at peace with all the world. It is true that

he also then bound himself to such military service in time of war, should the nation be at war during his term of enlistment; but he did not at any time forego the material advantages of civil life for the express purpose of defending his country in its hour of peril; as did those who either voluntarily or under the selective service law entered the military service of their country, not as a vocation, but solely for its defense in its hour of peril.

Reading as a whole the language of the body of the act, above quoted, in the light of the language of its title, we feel constrained to hold that, by the passage of the act, there was expressed the state's legislative intent to further compensate for their military service during the world war only those who abandoned the material advantages of civil life to aid in the defense of their country during the specified war period.

The judgment is affirmed.

HOLCOMB, BRIDGES, FULLERTON, MAIN, TOLMAN, MITCHELL, and MACKINTOSH, JJ., concur.

ON REHEARING.

[*En Banc.* January 5, 1922.]

MACKINTOSH, J.—The opinion filed in this action on September 13, 1921, was thereafter, upon the granting of a petition for rehearing, reconsidered, and the court is of the mind that the reasoning in that opinion should not prevail.

Section 1, ch. 1, p. 7, Ext. Session Laws of 1920, is as follows:

"There shall be paid to each person who was regularly called, enlisted, drafted, inducted, or commissioned and who served on active duty in the Army, Navy or Marine Corps of the United States between the 6th day of April, 1917, and the 11th day of No-

vember, 1918; and to each person who, being a citizen of the United States at the time of his entry therein, served on active duty in the naval, military or air forces of any of the governments associated with the United States during the war with the central allied powers between the 6th day of April, 1917, and the 11th day of November, 1918; and who, at the time of his call, enlistment, induction, commission or service, was a *bona fide* resident of the State of Washington, the sum of fifteen dollars ($15) for each and every month or major fraction thereof of active duty performed subsequent to April 6, 1917, and prior to November 11, 1919."

Although this section is subject to the interpretation given it by this court in the prior decision, above cited, upon a review, as we have said, of the question we are satisfied that the interpretation is not the proper one to be given, for the reason that it now appears that it excludes from the operation of the act a great many persons who were specially intended by the legislature to receive equalized compensation. We therefore believe that the interpretation to be given to the section is that there shall be paid a bonus to every person in the military service of the United States, a citizen of the United States and a *bona fide* resident of the state of Washington, who was on active duty between the 6th of April, 1917, and November 11, 1918. The act, by its terms, includes every soldier and sailor, no matter when he may have entered military service, provided he served between the dates mentioned. It is unnecessary to refer to the title of the act to add to or explain the meaning of this section. The only thing necessary is to apply the plain language of the section to the situation presented by the facts of this case; which are, that the appellant entered the military service of the United States long prior to the emergency created by the world war, and did not enter only and

for, or in anticipation of, defending this nation and this state during that emergency. To allow him and others similarly situated the compensation provided would be to render the act unconstitutional. As pointed out in this court's opinion passing on the constitutionality of the act in question (*State ex rel. Hart v. Clausen,* 113 Wash. 570, 194 Pac. 793), the payments are to be made for the purpose of equalizing the compensation of those who left their ordinary peaceful pursuits and entered into military service at a sacrifice and for the specific purpose of protecting the nation and the state in a specific emergency. Those who did not do this are not entitled to compensation, and the state has not the power to make payments which would not be equalizing compensation but would be mere gratuities.

The act, then, by its language, includes payments to persons who, under the law, are not entitled thereto, but this does not render the act inoperative as to those who are entitled to its benefits. In other words, although the act, by its terms, applies to every person in the military service between April 6, 1917, and November 11, 1918, it can only apply to those who, as we said in the prior opinion in this case, "abandoned the material advantages of civil life to aid in the defense of their country during the specified war period." The appellant, not being in this class, was not entitled to compensation under the act.

Although this disposes of the question before us, upon a reargument of the case it has been made to appear that a great many citizens of the United States and *bona fide* residents of this state, who had "abandoned the material advantages of civil life to aid in the defense of their country during the specified war period," and who have performed active service between

the dates mentioned, have claims pending, and for the purpose of avoiding further litigation, it is advisable to lay down a rule covering those cases.

It being the duty of the state auditor to pass upon the applications for compensation, the determination of whether an applicant, being a citizen of the United States and a *bona fide* resident of this state, entered the military service (army, navy or marine corps), and abandoned civil life with the intention and for the purpose of aiding the nation and the state in the emergency, and was actually on active service during the period laid down in the statute, are facts to be determined by such officer in passing upon such applications. When the state auditor determines that a citizen of the United States and a *bona fide* resident of this state left civil life and entered in the manner specified, it is the duty of the state auditor to allow compensation, regardless of the time of such entry into such service, if it clearly appear that such entry was made to meet the specific emergency and resulted in the abandonment of the material advantages theretofore enjoyed in civil life and which he would not otherwise have so abandoned. Judgment affirmed.

FULLERTON, MAIN, TOLMAN, BRIDGES, MITCHELL, and HOLCOMB, JJ., concur.

PARKER, C. J. (concurring)—Further reflection has induced me to now concur in the result reached by Judge Mackintosh touching the meaning of the act in question. I am, however, induced to so concur only because of the language of the title to the act, which seems to me to shed light upon the language of the body of the act. In other words, I feel that I would be unable to so concur if I felt compelled to rest my conclusion as to the meaning of the act upon the lan-

guage found in the body thereof, without reference to the title.

HOVEY, J. (concurring)—I concur in the result reached by the majority opinion, but I do not wish to assent to the doctrine that you can import words into an act for the purpose of avoiding the conclusion that it is unconstitutional. When the title of the act is considered and given its proper application to the statute, this difficulty is overcome. Where the statute is ambiguous and the intent of the legislature cannot be clearly ascertained from its terms the title is an important aid. Even at common law, where the acts did not always have titles, and what they did have were prepared by the clerks, yet they were sometimes considered in getting at the meaning of the act. For an interesting discussion with many citations see *Mutual Fire Ins. Co. v. Stokes*, 9 Phila. Rep. 80. The courts of this country have adopted the same principle from the earliest times. In *United States v. Fisher*, 2 Cranch 358, 2 Law Ed. 304, decided in 1804, Chief Justice Marshall refers to the title of the act in explaining the meaning of its body. And in the later case of *Church of Holy Trinity v. United States*, 143 U. S. 457, where the title of the act relating to immigration referred to laborers as the persons aimed at, the same court held this was sufficient to limit general language in the body of the act applying to all foreigners. It is quite generally recognized that in states having a constitutional provision like ours, where the object of the act must be stated in the title, even more importance is attached to it. The rule is stated in Sutherland, Statutory Construction, § 339, and the cases cited clearly support the text.

Closely connected with the foregoing principle, and, in fact, one of the grounds upon which many of the

cases where it is applied are based, is that "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed." *United States v. Fisher, supra.*

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." *Church of Holy Trinity v. United States, supra.*

The title of this act contains the following: "For the payment of equalized compensation to veterans of the war with the central allied powers." This shows that this act contemplated two things: (1) Equalized compensation. It is a matter of common knowledge that this country was confronted with the necessity of taking part in the greatest war the world has ever known, and that the great majority of the men who left civil life to perform their duties as loyal citizens did so at considerable financial sacrifice, and that the object of this legislation was to increase the compensation to the men so situated. (2) Veterans of the war. It is also well known to every one that service in the world war was the act to be rewarded, and not the particular date of the enlistment. This is made plainly apparent by the latter portion of § 1, which extends the benefits of the act to those who served in the forces of the governments associated with the United States, the dates there being specifically applied to the time served. It is apparent that to reward the men last mentioned and to deny the same reward to men who enlisted in our own army under the same circumstances would be a gross injustice and something that the legislature must certainly not have intended. Nor

do I think the act should be so construed when it is considered as a whole and in view of the principles which I have applied.

[No. 16461. Department One. September 15, 1921.]

ADAMS COUNTY *et al., Appellants,* v. D. A. SCOTT, *Respondent.*[1]

STATUTES (47)—REPEALS—AMENDMENT OF ACT. Where a section of a code is amended "to read as follows," any matter in the original section not reincorporated in the amendatory section is thereby repealed; hence the right of appeal under the Donohue Road Law (Rem. & Bal. Code, § 5744) was abrogated by later amendment and re-enactment of § 5744, which omitted all matters connected with appeals.

APPEAL (18)—DECISIONS REVIEWABLE—COUNTY BOARD. Rem. Code, § 3909, providing for appeals generally from the acts of the board of county commissioners to the superior court is inapplicable where the board acts under a special law for special purposes, such as the Donohue Road Law.

HIGHWAYS (39)—ASSESSMENTS—JURISDICTION OF COURTS. Under Rem. Code, § 5769, permitting a property owner to secure a review by independent action in the superior court of an assessment under the Donohue Road Law, a direct appeal improperly taken, to the court, but treated by the parties as an independent action under the law warranted the court in taking jurisdiction.

SAME. The rule that courts will not interfere with the action of the taxing authorities in putting valuations upon property for general tax purposes, or in levying assessments for the construction of streets in a municipality, unless the authorities have acted fraudulently, arbitrarily, or upon a fundamentally wrong theory, or unless the valuation is so manifestly unjust and excessive as to amount to constructive fraud, is directly applicable to county highways which are constructed in part at the expense of private property.

SAME. Assessments made under the Donohue Road Law will not be set aside by the courts in the absence of a showing of fraudulent, arbitrary, or fundamentally wrong action by the county commis-

[1]Reported in 200 Pac. 1112.

sioners in making the assessment or that the appraisers acted in bad faith, or that the assessment was so excessive as to be a badge of fraud.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered June 26, 1920, in favor of an objecting property owner, reversing the action of the county board in levying an assessment of benefits for a road improvement, after a hearing before the court. Reversed.

W. O. Miller, for appellants.

C. W. Rathbun, for respondent.

Bridges, J.—This case was concerning the improvement of a certain road in Adams county, under what is generally known as the Donohue Road Law, § 5730 *et seq.,* Rem. Code, as amended by the Laws of 1917, p. 238.

Certain owners of lands in Adams county petitioned the board of county commissioners to improve a road, to be known as the Donohue Road Number Four. The commissioners, in due time, heard the petition, decided to make the improvement, let a contract and appointed a board of appraisers, as provided by the so-called Donohue law. The appraisers, among other things, assessed the property of Scott and others for benefits. The assessment so made was approved by the county commissioners, over the objection and protest of Mr. Scott. Being dissatisfied with the assessments against his lands, he appealed to the superior court of Adams county. Thereupon the county auditor certified to that court the proceedings taken by the commissioners. Thereafter the court proceeded to hear the whole matter, took oral testimony, and ultimately made a judgment reversing the action of the board of county

commissioners whereby they levied such assessments, and remanded the whole matter to that board for further action and for reappraisement of damages and benefits to the property embraced within the district comprising road district No. 4. From this judgment, the county and its board of commissioners have appealed to this court.

The appellants first contend that the superior court of Adams county did not get any jurisdiction of the matter, and that consequently this court can have no jurisdiction. Their argument is that the so-called Donohue Road Law does not make any provision for appeals from the board of county commissioners. Section 5744 Rem. Code, provides for an appeal to the superior court from certain acts of the county commissioners. However, the 1917 legislature elaborately amended this road law, and § 9 thereof begins as follows: "That section 5744 of Rem. & Bal. Code (P. C. § 6096; Laws 1917, ch. 72, § 9, p. 246), be amended to read as follows: Section 5744——". As amended that section is concerning matters in no wise connected with appeals. If this amendment had the effect of repealing those provisions of § 5744 of the original act with reference to appeal, then this road law does not provide for any appeal from the board of county commissioners with respect to these matters.

At page 1083, 36 Cyc., it is said:

"Generally speaking, where a statute is amended, 'so as to read as follows,' the amendatory act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; . . . On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption; that so much of the act as is omitted is repealed;"

At page 735, 26 Am. & Eng. Ency. Law (2d. ed.), the rule is stated as follows:

"A statute providing that certain sections of a prior act shall be amended 'so as to read as follows' repeals all contained in the sections of the original act not re-enacted . . ."

The same rule is laid down in 25 R. C. L. 923, as follows:

"Where a section expressly amendatory of another section of a statute purports to set out in full all it is intended to contain, any matter which was in the original section, but is not in the amendatory section, is repealed by the omission."

See, also, *State v. Benevolent Order of Elks*, 69 Miss. 895, 13 South. 255; *Hawes v. Petit*, 22 R. I. 312, 47 Atl. 705; *In re Wheelock*, 3 N. Y. Supp. 890.

We therefore conclude that the original provision for appeals has been repealed, and that the so-called Donohue Road Law, as it now exists, does not make any provision for appeals from orders of the county commissioners. Indeed, the respondent does not here seem to seriously contest this question, but contends that he is entitled to appeal by virtue of the general appeal act concerning appeals from acts of the board of county commissioners. See § 3909 Rem. Code (P. C. § 1679). That section provides: "Any person may appeal from any decision or order of the board of county commissioners to the superior court of the proper county." The section then proceeds to point out minutely the way in which such appeals may be taken and how the matter shall be tried when it reaches the superior court. Appellant, however, contends that section is general in its nature and does not authorize appeals from the board of county commissioners when it is acting under a special law for special purposes. Following the spirit of our previous de-

cisions, we feel compelled to uphold appellants' position on this contention.

In the case of *Lawry v. Board of County Commissioners*, 12 Wash. 446, 41 Pac. 190, the court stated the question involved to be as follows:

"As stated in the brief of appellant, the only question for discussion and determination in this case is, will an appeal lie from a decision or order of the board of county commissioners with respect to the removal of a county seat."

In holding that the general appeal statute did not authorize an appeal in the case, the court said:

"But in this case there are special reasons for holding that no appeal will lie from the order complained of. By the statute relating to the removal of county seats, duties are cast upon the board of county commissioners which are separate and distinct from their ordinary and usual duties. In discharging them, it acts as the representative or agent of the legislature, by virtue of a special statute enacted for the sole purpose of clothing it with special powers, and which provide for no appeal. We think the general appeal act refers only to the usual proceedings of the board and not to special proceedings under a special statute for a special purpose."

In the case of *Olympia Water Works v. Thurston County*, 14 Wash. 268, 44 Pac. 267, the question was whether the general appeal statute mentioned authorized an appeal from an order made by the board of county commissioners sitting as a board of equalization. We said:

"It (the decision of the board of equalization) was made in pursuance of an act providing in detail for the assessment and collection of taxes, and in that act must be found the right of appeal, if it exists. And the fact that the right to appeal from any decision is given in the act providing for the general duties and powers of the board of county commissioners can have

no effect upon the decision required of such board by the act, upon this special subject. . . .

"Under well settled general rules for the interpretation of statutes, the section authorizing appeals contained in the general act as to boards of county commissioners, could have no effect upon decisions made by the board in performing duties required by the revenue act. This interpretation is required by the general rule that provisions in a general act do not affect those contained in a special one, unless the legislative intent to that effect is manifest."

In the case of *Selde v. Lincoln County,* 25 Wash. 198, 65 Pac. 192, the question involved was whether, under the general statute with reference to appeals, an appeal could be taken from the act of the board of county commissioners in refusing to establish a certain road for which petition had been made. After discussing the question somewhat elaborately, this court said:

"What are the limitations upon appeals to the superior court from the decisions of the board of county commissioners? The superior court exercises only judicial power; hence appeals from the board of county commissioners to the superior court must be limited to such cases as require the exercise of purely judicial powers, and therefore when the board of county commissioners exercise political power, or legislative power, or administrative power, or discretionary power, or purely ministerial power, no appeal involving a trial *de novo* will lie."

To the same general effect see *Lewis v. Bishop,* 19 Wash. 312, 53 Pac. 165; *State ex rel. Yeargin v. Maschke,* 90 Wash. 249, 155 Pac. 1064.

The general appeal statute is a part of the compiled statutes with reference to the general duties and powers of the board of commissioners. It is true these statutes authorize the board to "lay out, discontinue, or alter county roads and highways within

their respective counties, and do all necessary acts relating thereto according to law . . .", but this was an expression of the powers to be performed "according to law." It was necessary that other legislative laws point out the procedure. Those other laws must be held to be exclusive within their spheres.

The logic of the situation and of these cases cited requires us to hold that Mr. Scott could not appeal from the action of the board of county commissioners in making the assessments for benefits against his lands.

The respondent contends, however, that the spirit of our laws must in some way permit him to enter the courts for the purpose of protecting himself and his property against what he contends to be the arbitrary and wrongful acts of the board of county commissioners. It must be remembered, however, that there is no right of appeal except it be given by statute, and that a citizen cannot complain except to the legislature if he considers himself aggrieved in that regard.

But it does not necessarily follow from what we have said that a person placed in the position of the respondent is entirely deprived of recourse to the courts. It is our opinion that respondent would have had the right to commence in the superior court a special and independent action for the purpose of securing a review of the wrongs of which he complains. Such was the procedure in the recent case of *James v. McMillan,* 115 Wash. 159, 196 Pac. 881. That was a case involving assessments made by virtue of the identical road laws here under discussion. It is true, the questions which are raised in this case were not raised in that, nor by this court discussed in the opinion in that case. But it would appear that all parties, including this court, assumed that such an independent action could lawfully be maintained. In-

deed, this identical road law expressly contemplates that the courts shall have the right to review in some manner the acts of the board of commissioners. Section 5769, Rem. Code (P. C. § 6112), provides that:

"The court in which any proceeding is brought to . . . declare void the proceedings to locate or establish any road, or to enjoin any tax or assessment levied or ordered to be levied to pay for the labor and expense as aforesaid shall, if there is manifest error in the proceedings, allow the plaintiff in the action to show that he has been injured thereby, and may on application of either party, appoint such person or persons to examine the premises or to survey the same, or both as may be deemed necessary, the court in which any such proceedings are begun shall allow parol proof that said improvement is necessary and will be conducive to the public needs, convenience and welfare . . . and with or without finding error, the court may correct any gross injustice in the apportionment made by the commissioners; the court shall, on final hearing, make such order in the premises as shall be just and equitable, and may order that such tax and assessment remain on the duplicate assessment-roll for collection, or the same to be levied, or may perpetually enjoin the same or any part thereof . . ."

Under this view of the law, the respondent having undertaken to transfer the proceeding by appeal to the superior court, is it proper that we should hold that, having come into court by the wrong door, he may be dismissed without hearing? The record discloses that, after the appeal was taken, the appellants caused a transcript of their proceedings to be certified to the trial court. They also appeared in that court and moved to require the respondent to set out, in a bill of particulars or otherwise, the grounds of his complaint and the reasons for his dissatisfaction. The respondent complied with the order of the court requiring him

so to do. Thereafter the case came on for trial in the usual and customary manner. All of the parties being present, or represented by attorneys, a large amount of testimony was taken, and the court entered a judgment in the case. At no time, so far as we can find in the record, did the defendants (appellants here) raise in the lower court the question of jurisdiction, or permit the trial court to consider or pass upon the questions which they have raised in this court. Under these circumstances, it would seem that we should treat the case, although it reached the superior court by direct appeal, as being maintained and tried there by consent of the parties as an independent action, and the bill of particulars made by the plaintiff (respondent here) may be taken as his petition or complaint in such action, upon which the case was tried in the lower court. So considering the case, we should next determine whether or not the judgment appealed from was correct.

We have always held that courts should not interfere with the action of the taxing authorities in putting valuations upon property for general tax purposes, unless such authorities acted fraudulently, arbitrarily, or upon a fundamentally wrong theory, or unless the valuation was so manifestly unjust and excessive as to amount to a constructive fraud. We have also consistently applied this same principle of law to assessments for benefits levied by municipalities on property for the purpose of constructing streets within the municipality. *Powell v. Walla Walla,* 64 Wash. 582, 117 Pac. 389; *Great Northern R. Co. v. Seattle,* 73 Wash. 576, 132 Pac. 234; *In re Boyer Avenue,* 79 Wash. 664, 141 Pac. 58; *In re West Bertona Street,* 81 Wash. 125, 142 Pac. 483; *Spokane v. Onstine,* 86 Wash. 4, 149 Pac. 1; *In re Orcas Street,* 87 Wash. 218, 151 Pac. 506.

Although this identical question has not been before us in so far as it concerns the construction and improvement of county highways, we see no reason why the doctrine with reference to general taxation and with reference to municipal streets should not be fully applicable concerning assessments for benefits for the construction of county highways. The statutes have imposed upon the county commissioners the duty of making this assessment, and it will be presumed that they have acted in good faith and according to their judgment, and it was never intended that the courts should supplant the discretion thus vested in the commissioners and install instead its own judgment alone upon conflicting testimony as to the justness of the assessment. Any other rule would be against the spirit of the statutes and would unduly and unnecessarily interfere with the procedures provided by law for the construction of highways. We therefore hold that the rule with reference to valuations of property for general tax purposes, and the assessments for benefits by municipalities for the construction of streets, is directly applicable to highways which are constructed in part at the expense of private property.

There is nothing in this case which would bring it within the rule thus announced. There is no charge in the bill of particulars filed by the respondent, of fraudulent, arbitrary, or fundamentally wrong action by the commissioners in making this assessment, nor is there anything in the testimony, or elsewhere, to show that the appraisers appointed by the commissioners to make such assessment did otherwise than use their best judgment and act in good faith. The number of witnesses produced by either side was about equal. While the witnesses for the respondent considered the assessments too high, they did not intimate at what amount the assessments should have been fixed. Nor

did any of these witnesses contend that the assessments were so excessive as to be a badge of fraud. On the other hand, appellants' witnesses testified to the justness of the assessments, and that they were made in good faith, after a thorough investigation of the facts. Following the rule announced, it cannot be said there is anything in this testimony which would authorize the courts to set aside the assessments made by the appraisers and approved by the county commissioners.

The judgment is reversed, and the cause ordered dismissed.

PARKER, C. J., FULLERTON, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 16325. Department One. September 15, 1921.]

SECURITY NATIONAL BANK, *Appellant*, v. A. H. MASON *et al.*, *Respondents*.[1]

HOMESTEAD—CONSTRUCTION OF LAW. Homestead laws are to be liberally construed.

SAME (35)—TIME FOR MAKING CLAIM. The first part of Rem. Code, § 529, declaring the homestead of every head of a family exempt from execution or attachment is still in force; and, under the last sentence, providing that such homestead may be selected at any time before sale, a judgment creditor acquires no priority of lien through filing a writ of attachment before the debtor makes his declaration of homestead.

SAME. As against a purchaser on execution sale, a homestead declaration must be filed before sale.

HOMESTEAD (38-40)—ACTIONS—CLAIM OF HOMESTEAD—PLEADING. Failure of judgment debtors to set up and claim a homestead in the action in which attachment issued (but which was done before execution sale) does not preclude or bar them from pleading, in an action by the execution purchaser to determine title, that the land was exempt as a homestead.

[1]Reported in 200 Pac. 1097.

Appeal from a judgment of the superior court for Douglas county, Hill, J., entered October 23, 1920, upon findings in favor of the defendants, in an action of ejectment, tried to the court. Affirmed.

Charles P. Lund, for appellant.

Fred M. Williams, for respondents.

HOLCOMB, J.—This action is in ejectment to determine the title to the northeast quarter of section 32, township 29, north, range 26, E. W. M., in Douglas county, Washington. On November 23, 1915, and for some time prior thereto, Mason and wife were owners in fee of the real estate, and in occupancy thereof. On October 23, 1914, defendant A. H. Mason, acting for the community, executed and delivered to appellant bank a promissory note for $2,000, and thereafter, on November 23, 1915, the bank commenced an action in the superior court for Spokane county against Mason and wife upon the note. Personal service was had upon both defendants. At the commencement of the action, the bank caused a writ of attachment to be legally sued out, directed to the sheriff of Douglas county, Washington, which, on November 26, 1915, was duly levied upon the real estate in question. The bank also, on November 26, 1915, caused a *lis pendens* to be filed in the auditor's office of Douglas county, Washington. A. H. Mason defaulted, and his wife, Annie E. Mason, filed an answer in the case in Spokane county, but did not appear to contest the action. On February 10, 1916, the Spokane court made findings of fact, conclusions of law and judgment in favor of appellant for the full amount demanded. Appellant was granted judgment against both the Masons, and the writ of attachment was in all respects declared to be valid and lawfully sued out, and the real

estate theretofore attached directed to be sold by the sheriff of Douglas county, under the writ of execution issued under the Spokane county judgment, as provided by law. Pursuant to that judgment, an execution was duly issued, directed to the sheriff of Douglas county, who, acting thereon, on April 22, 1916, sold the real estate involved, in the manner provided by law, and issued a certificate of sale therefor to appellant. Thereafter the sale was duly confirmed, and on May 8, 1917, no redemption having been made, the sheriff of Douglas county issued a deed to appellant.

After the commencement of the Spokane county action, and the issuance and levy of the writ of attachment, and the filing of the *lis pendens* in the auditor's office of Douglas county, to wit, on December 2, 1915, the defendants, Mason and wife, executed and delivered to C. D. Martin and E. E. Garberg a warranty deed in the usual form for the real estate involved, which deed was duly recorded in the auditor's office of Douglas county. Afterwards, on February 17, 1916, Mason and wife took a reconveyance of the property by way of a quitclaim deed from Martin and Garberg and their wives, which was duly recorded. Appellant calls this transaction a repurchase by Mason and wife from Martin and Garberg of the real estate. Having repurchased the real estate subject to the attachment lien of plaintiff, as appellant claims, on March 4, 1916, Mason executed, acknowledged and filed in the auditor's office of Douglas county, Washington, a declaration of homestead, and no declaration of abandonment has ever been made. It will be noted that this declaration of homestead was made after judgment in the case in Spokane county, but before sale under execution. Mason and wife claiming title, and having possession, appellant brought this suit.

On the issue of fact of whether or not the conveyance by Mason and wife to Martin and Garberg was in fact an absolute conveyance or a mortgage, the trial court found that the deed was intended to be, and was, in fact, an absolute deed of conveyance of the real estate, and vested title thereto in Martin and Garberg, subject to the attachment of plaintiff. The trial judge, however, decided that the conveyance by Mason and wife to Martin and Garberg, and the reconveyance by Martin and Garberg to Mason and wife, did not cut off the statutory right of homestead, and that is the sole question to be determined on this appeal.

No statement of facts or bill of exceptions was brought up, and the question has to be determined solely upon the findings of fact and conclusions of law.

Appellant urges two propositions to justify a reversal: First, defendants could not, by purchasing the real estate, already burdened with the lien of plaintiff's attachment, obtain a better title or greater rights than their grantors had therein; and second, the judgment of the superior court for Spokane county in which the attachment was issued, and the final judgment rendered directing the sale of the real estate involved, is *res judicata* between the parties.

It is first contended that the attachment in the Spokane county suit created a specific lien *in rem* against the real estate here involved, and that when the judgment was granted expressly preserving the attachment lien, that the execution preserved the specific lien against the property under the judgment. *Sheppard v. Guisler*, 10 Wash. 41, 38 Pac. 759, and *Van De Vanter v. Davis*, 23 Wash. 693, 63 Pac. 555, are cited as sustaining the above contention.

We have uniformly held, since the earliest days of statehood, that homestead and exemption laws are to be liberally construed, because of the interest that the

public has in the maintenance and protection of the home of the individual citizen. Such laws were commanded to be enacted by art. 19, § 1, of our constitution. Prior to statehood, the territorial legislature had provided that:

"There shall be also exempt from execution and attachment to every householder being the head of a family, a homestead, etc. . . . Such homestead may be selected at any time before sale." Code of 1881, § 342, p. 76; Rem. Code, § 529.

We held in *Wiss v. Stewart,* 16 Wash. 376, 47 Pac. 736; *Anderson v. Stadlmann,* 17 Wash. 433, 49 Pac. 1070; *Ross v. Howard,* 25 Wash. 1, 64 Pac. 794; *In re Feas' Estate,* 30 Wash. 51, 70 Pac. 270, and *State ex rel. Jakubowski v. Superior Court,* 84 Wash. 663, 147 Pac. 408, that the last sentence of that section, "that such homestead may be selected at any time before sale," was not superseded by the Laws of 1895, ch. 64, p. 109, relating to the manner of selection and the value of a homestead, but that that chapter merely superseded all other laws relating to the method of selecting or declaring a homestead, and the value thereof. The same reasoning leaves in force the first portion of § 342 of the act of 1881, as follows: "There shall be also exempt from execution and attachment to every householder being the head of a family, a homestead." There is no other declaration outside of the constitutional requirement, which we have held is not self-executing, "that there shall be exempt," etc., "a homestead." We held, also, in *Snelling v. Butler,* 66 Wash. 165, 119 Pac. 3, and in *Kenyon v. Erskine,* 69 Wash. 110, 124 Pac. 392, that a judgment becomes a lien upon property, subject to the right of the owners of the property to defeat execution sale by the filing of a homestead declaration. When the declaration is

filed the property becomes a homestead, and as such it is exempt from execution and forced sale.

We also held in the *Jakubowski* case, *supra,* that in order to preserve the homestead right as against a purchaser on execution, it is necessary that the declaration of homestead be filed prior to the date of the sale. Such was the fact in this case. Appellant argues, however, that these holdings do not mean that the judgment debtors may purchase the property burdened with a lien and thereby avoid such lien, which might have been enforced against their grantors except for the conveyance. That is not the case here. Appellant could not have enforced its judgment against the property passing to Martin and Garberg unless the property went to them burdened with a specific lien by attachment; but in the hands of the Masons, the owners, it was as much subject to homestead exemption against the attachment as against the execution, for they could declare the homestead in the premises at any time before sale, and appellant could not have prevented it.

Under the authorities generally, had the homestead declaration been made before the writ of attachment was sued out, the writ of attachment would not have created even the appearance of a lien against the real estate; and since our statute provides that the declaration of homestead may be made "at any time before sale," one cannot acquire a prior lien, defeating a right of homestead, by a writ of attachment. The trial judge observed:

"The transfer by the Masons of the title to the property burdened with the judgment lien did not constitute such lien a thing that inhered in or attached to the property independently of the personal obligation of the defendants evidenced by the judgment. Such lien, for its enforcement, must depend on an exe-

cution under said judgment, and a sale under such execution would be a forced sale to compel the payment of the personal obligation of the defendants. The defendants having impressed the land in question with the character of a homestead prior to the execution sale thereof under which plaintiff claims title thereto, said sale was such as the law prohibits and was therefore void."

We believe the above observations are correct.

It is further claimed by appellant that the judgment of the superior court for Spokane county, in which the attachment was issued and final judgment entered, and in which the Masons were personally served and the wife appeared and defended, is *res judicata.* It is asserted that the right of a homestead, if any had been claimed or intended to be claimed, should have been asserted by the judgment debtors. The case of *Brandon v. Leavenworth,* 99 Wash. 339, 169 Pac. 867, is cited as conclusive. In that case judgment was recovered and execution issued and returned *nulla bona.* Afterwards an action in the nature of a creditors' bill was instituted, demanding that the deed from Brandon to his wife be set aside on the ground that it was made for the purpose of defrauding respondents, and that the judgment in the former suit be decreed a specific lien upon the property, and that it be sold to satisfy the judgment. Four or five days before answering, appellants filed their claim of homestead in the office of the auditor of the proper county. A trial was had and decree entered declaring the deed fraudulent and the judgment a lien, and ordering the property sold on execution. The decree was not appealed from. Thereafter the property was sold and bought in by respondents for the amount of their judgment, and the sale duly confirmed. It was held that, although appellants had filed a declaration of homestead at the

time they answered in the suit to subject their property to the lien of the judgment, they did not plead it in bar of that action. The same rule was stated in *Traders Nat. Bank of Spokane v. Schorr*, 20 Wash. 1, 54 Pac. 543, 72 Am. St. 17, in an action in the nature of a creditors' bill.

It will be observed that both of these actions were creditors' actions brought to set aside specified fraudulent conveyances and subject the debtor's real estate to the prior judgment lien. This court simply held in both actions that the judgment debtors were put upon their defenses to show any superior right or title they had which would prevent the enforcement of the judgment lien set up in the creditors' bill. The last cited case simply followed the first case cited, to the effect that it was the duty of the debtor to plead that the land was exempt for homestead, they having prior thereto filed their declaration of homestead in the suit brought to subject the land to the lien of the judgment. And that is exactly what respondents have done in this case. They have pleaded that the land was exempt as a homestead, and set up their declaration of homestead.

We conclude that the judgment of the trial court was correct.

Affirmed.

PARKER, C. J., FULLERTON, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16274. Department Two. September 15, 1921.]

JOSEPH OSTANT *et al.*, *Appellants*, v. PACIFIC GROCERY COMPANY, *Respondent*.[1]

MUNICIPAL CORPORATIONS (356, 370)—USE OF STREETS—OBSTRUCTIONS — RIGHTS OF ABUTTING OWNERS — INJUNCTION — DECREE. An owner of residence property is not entitled to an injunction against the use of any part of the pavement in front of and abutting on his property, by a small electric truck, with rubber tires, where the pavement was not intended as a sidewalk, and the truck only made infrequent trips and did not interfere with use by pedestrians.

SAME. Where a railway company has constructed a common-user spur-track in an alley with the consent of the city under the power granted by Rem. Code, § 7507, subd. 9, a decree enjoining defendant from using that part of the track opposite plaintiff's premises for the storage of cars, and restraining defendant from allowing cars being loaded from its warehouse to project in the rear of plaintiff's premises longer than forty-eight hours, sufficiently protects the personal and property rights of plaintiff.

Appeal by plaintiffs from a judgment of the superior court for Snohomish county, Brawley, J., entered June 9, 1920, in favor of the plaintiffs, in an action for an injunction, tried to the court. Affirmed.

A. Joseph Allen (James R. Chambers, of counsel), for appellants.

Black & Black, for respondent.

MITCHELL, J.—Joseph Ostant and wife are the owners of real property fronting fifty feet on the east side of Chestnut street, in the city of Everett, upon which is situated an old store building, flush with the street and occupied by them as a residence. Their property extends back one hundred and twenty feet to an alley that parallels the street. Adjoining their property on the north is an alley, twenty-four feet

[1]Reported in 200 Pac. 1032.

wide, running east and west, and which is paved with concrete for a distance of one hundred and twenty-three feet from the street. The premises immediately south of the Ostant property, consisting of forty-five feet frontage on the street, are occupied by the Pacific Grocery Company as a warehouse and storage room used in connection with its wholesale grocery business. South of the warehouse the property is open and unplatted and is a part of the terminal grounds of the Northern Pacific Railway Company. On the same side of Chestnut street, north of the Ostant property and separated from it by the twenty-four foot alley, the property, fronting about one hundred and twenty-five feet on Chestnut street and reaching to the intersection with Hewitt avenue, is occupied by the Pacific Grocery Company for its sales rooms. The east fourteen feet of Chestnut street is paved with concrete, the surface of which is practically even with other portions of the street, including a wood block pavement located along the center of the street.

In the north and south alley at the rear, a spur railroad track has been constructed from the Northern Pacific Railway Company yards which is used by the Pacific Grocery Company in its rail shipments. The spur track crosses the twenty-four foot alley at grade and extends northerly only to a point near the center of the east line of the grocery company's sales room property. Paralleling this spur track and within forty feet east of it, there is, and for a great number of years has been, another railroad spur not altogether on public property and extending considerably further north to facilitate the shipments of other business concerns. The territory south of Hewitt avenue and east of Chestnut street is devoted almost exclusively to wholesale, manufacturing and railroad purposes. With the exception of the second story of an-

other building, the Ostant property is the only residence in the district. Considerable of the merchandise carried from the warehouse to the sales rooms of the grocery company is handled by hand trucks and one electric power truck, operated by the grocery company along the fourteen-foot pavement on the east side of Chestnut street, while the rail shipments are handled direct with the cars that for convenience are spotted on the railroad spur alongside the warehouse and sales rooms.

About the time of commencing the construction of the railroad spur and only a few months after the grocery company commenced the occupancy of its premises, Mr. and Mrs. Ostant, conceiving the idea that their property rights were being invaded, brought this action against only the Pacific Grocery Company to enjoin the use of its hand trucks and the electric truck, or any other kind of vehicle, on the concrete paving on Chestnut street, and to prevent the operation and maintenance of the railroad spur in the alley in the rear of their property. After the issues were made up a trial was had. The judgment entered provides as follows:

"It is ordered, adjudged and decreed that the defendant be and it is hereby restrained and enjoined from using the Northern Pacific Railway Company spur in that part of the alley immediately east of the plaintiffs' premises for the purpose of storing cars, defendant being permitted, however, to load and unload cars at either door of its warehouse and to use said spur for the purpose of moving cars to and from its landing north of plaintiffs' premises and to and from said warehouse, said defendant being enjoined, however, when loading or unloading cars at the north door of its warehouse from having the cars project in the rear of plaintiffs' premises for longer than 48 hours or project so far north as to prevent ingress or egress to plaintiffs' premises from said alley; it is pro-

vided and adjudged, however, that said defendant is not to be held responsible for the act or acts of the Northern Pacific Railway Company or any other railways or their employes, unless at the request, suggestion or solicitation of defendant, its officers, servants or agents.

"It is further ordered, adjudged and decreed that the said defendant be and it is hereby restrained and enjoined from using trucks on the easterly portion of that certain concrete pavement or sidewalk on the east side of Chestnut street immediately in front of and adjoining the premises of said plaintiffs, defendant being permitted, however, to run its trucks on the westerly portion of such concrete pavement or sidewalk, the intention hereof being that the easterly portion of such concrete pavement or sidewalk in front of and adjoining plaintiffs' premises shall be used as a sidewalk for plaintiffs and the public generally."

The plaintiffs, claiming the relief granted was inadequate, have appealed.

By the first assignment of error it is insisted that the respondent should be enjoined from using the pavement in front of appellants' premises "at any time or for any purpose with either hand or electric power trucks, or for any other purpose than the use of pedestrians." The concrete pavement on the east side of Chestnut street is referred to. Primarily, the pavement is not, and was not intended to be, a sidewalk. It was laid about the time the respondent moved to its present quarters, and in contemplation of their needs and others of a similar kind. The improvement was made on the petition of the property owners, and while the appellants were not petitioners therefor, Mr. Ostant was present when the city commissioners considered and determined the kind of pavement to be laid. The evidence is clear that they decided to construct it as it was constructed, with thicker concrete than was required or used in side-

walks proper, level to the property line with the remainder of the street, so that the new pavement could and should bear vehicular traffic similar to street construction often found in wholesale districts, and like other similar pavements in portions of the business district of the city of Everett. The pavement is one and one-half times as thick as ordinary sidewalk construction, and was decided upon with the understanding (which was carried out) that appellants' property should bear the cost of only the ordinary thickness, and the remainder of the property in the improvement district should meet the excess cost in front of appellants' property and the whole cost of the improvement elsewhere.

The electric truck complained of is a small vehicle used in the warehouse and sales rooms and also on the street between those places. Its wheels are rubber tired; it is three or four feet wide and fifteen to eighteen inches high; and it has a capacity of one to one and one-half tons. Mr. Ostant testified: "The empty truck goes about five or six miles an hour, and when loaded, hardly a mile an hour." Some of appellants' witnesses testified that, in passing, "it did not interfere with anybody." Indeed, the testimony shows the electric truck was being used on the pavement on an average of one trip each day and that its interference with any one was practically negligible. The situation is clearly shown by the testimony of the assistant city engineer, as follows: "I do not believe I know of any street in Everett where there is less traffic by pedestrians than on the east side of Chestnut street; don't believe I do; about the only pedestrians you would expect would be Mr. Ostant's family, and a sidewalk four to six feet wide would be sufficient; there would be no reason for putting in a fourteen feet con-

crete pavement six inches thick except for business districts."

It is argued that the pavement is, strictly speaking, a sidewalk only and should be used in no other way. We have seen that, within the knowledge of the appellants, the city authorities constructed it for the use of vehicles as well as pedestrians. The city is not a party to this action, nor is there in evidence any traffic ordinance of the city. In *State ex rel. Attorney General v. Seattle Gas Co.*, 28 Wash. 488, 68 Pac. 946, this court said:

"We have said that the presumption of law as to a public officer is that he does his duty. The same presumption prevails as to the officers of a city government, to whom is delegated by the state the power of controlling the streets of the city. It will not be presumed that they permit the use of the streets in violation of law. In the first instance, they are charged with the duty of controlling the use of the streets; . . ."

Independent of such presumption, however, under the facts and circumstances in evidence here, the judgment on this feature of the case abundantly protects the appellants in their property and personal rights.

The other assignments of error call in question the use made of the railroad spur in the alley at the rear of appellants' property, of which little need be said. The respondent is not a public service corporation nor is it interested in the ownership, control or maintenance of the spur. It belongs to the Northern Pacific Railway Company, which constructed it with the consent of the city, upon a primary grade fixed by the city. Subdivision 9, § 7507, Rem. Code (P. C. § 678), empowered the city to permit the use of the alley for that purpose, and it was built with the understanding it was to be a common-user spur, subject, of course, to

the use of appellants as well as other persons. The establishment of it with its resultant injury to appellants' property, if any, creates no liability against the respondent. All that the respondent can be holden for is the manner of its use of cars in loading and unloading them, and in this respect the judgment entered by the trial court is correct, reasonable and equitable.

Judgment affirmed.

PARKER, C. J., MAIN, HOLCOMB, and TOLMAN, JJ., concur.

[No. 16514. Department Two. September 15, 1921.]

GRANT A. STEWART *et al.*, *Appellants*, v. WILLIAM P. ULRICH, *Respondent*.[1]

PARTNERSHIP (28)—LIABILITY BETWEEN PARTNERS—ACQUIRING ADVERSE INTEREST—FRAUD. The fact that one partner in a firm operating a billiard-room had a secret agreement with the lessor of the premises to enter into partnership with him to go into the same business on termination of the lease, does not render him liable to his copartners in damages, where it is not shown that the acts were wrongful or fraudulent or to prevent a renewal of the lease, notwithstanding the assets of the partnership were sold to the lessor without knowledge of the facts.

Appeal from a judgment of the superior court for Spokane county, Lindsley, J., entered April 1, 1921, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief. Affirmed.

Allen, Winston & Allen, for appellants.

Turner, Nuzum & Nuzum and *Wakefield & Witherspoon*, for respondent.

TOLMAN, J.—From an order sustaining a demurrer to the second amended complaint, and judgment dis-

[1]Reported in 201 Pac. 16.

missing the action, this cause is brought here on appeal. The sole question to be determined is, does the complaint state a cause of action.

After setting forth that the plaintiffs and the defendant had been copartners engaged in the operation of a billiard parlor, which had been very profitable financially, it is alleged that, on January 9, 1919, the partners entered into a written agreement, which is made a part of the complaint, by the terms of which Grant A. Stewart and Dayton H. Stewart, theretofore owners of a one-half interest in the business, sold to E. B. Stewart and William P. Ulrich one-half of their then interest, or a one-fourth interest in the business, and purported to lease to such grantees the remaining one-fourth interest which they retained, for a period of one year from January 5, 1919, for a consideration of $600 per month for the term. The agreement further provided for an inventory, assumption of indebtedness by the purchasing partners, and means by which the several interests and rights could be determined at the end of the year, and,

"It is further understood and agreed by and between the parties hereto that the partnership heretofore existing between the parties hereto shall be terminated, and that so long as the said parties of the first part shall maintain each an undivided one-eighth interest in said business, or either of the parties of the first part hereto shall own less than a one-fourth interest in said business, that neither of the parties of the first part herein shall have any right to dictate the policy of said business or be employed in said business without the consent of the parties of the second part herein, and that the interest of said parties of the first part after January 5, 1920, shall only be that of an owner of an undivided one-fourth interest in and to the fixtures, stock and appliances of said business, as above stated and referred to, and the parties of the second part shall only account to said parties of the

first part herein in that instance for an undivided one-fourth of the net profits of said business, after deducting a salary for each of the parties of the second part herein of thirty ($30) dollars per week."

And also:

"It is further understood and agreed by and between the parties hereto that the parties have a lease to the premises in which said business is now located, and that the said first parties do hereby transfer and assign unto said parties of the second part herein an undivided one-fourth (¼) interest in and to said lease and do hereby retain an undivided one-fourth (¼) interest in and to said lease; and in case said parties of the second part herein shall obtain a renewal or extension of said lease prior to its expiration or upon the expiration, and said parties of the first part are still the owners of said undivided one-fourth (¼) interest in said business, then and in that event said parties of the first part shall be entitled to an undivided one-fourth (¼) interest in said lease."

It is further charged in the complaint:

"Some time prior to the first day of December, 1919, the defendant conceived and placed into operation a plan and scheme to cheat and defraud the plaintiffs out of their interest in the aforesaid billiard parlor, whereby he could avoid his agreement contained in Exhibit 'A' to make the plaintiffs herein co-owners and jointly interested in any extension of the aforesaid lease.

"In pursuance of the said scheme and plan, he made and entered into an agreement either orally or in writing, the exact terms of which are to these plaintiffs unknown, whereby one James Durkin, the owner of and in charge of the property where the said business was being maintained and conducted, should refuse or fail to execute an extension of the old lease and whereby the property belonging to the parties hereto should apparently be sold to the said James Durkin who should thereafter conduct the said business. Pursuant to said scheme he procured and caused the said

Durkin to give a formal notice of the termination of said lease and of his refusal to extend or continue the same, or to grant a new lease, and notified the plaintiff that he desired possession of the premises. Pursuant to said scheme and plan to defraud, the defendant further urged and recommended to the plaintiffs that the parties hereto should sell to the said James Durkin at a low price, the property of the parties hereto, situate in said billiard parlor, and by his insistent advice and urging, the said plaintiffs, being ignorant of the facts hereinafter alleged, did agree to sell and did sell apparently to James Durkin, the personal property in said place of business for a sum not exceeding its actual cash value, as second hand goods at forced sale, with no allowance for good will, or lease of said premises.

"(5) At all times since the time when defendant conceived the said scheme to defraud plaintiffs, defendant had an agreement, oral or in writing with the said Durkin, the exact terms of which are unknown to plaintiffs, and plaintiffs on information and belief aver the fact to be, that the said agreement was to the effect that the said Durkin would refuse to renew the said lease or make a new lease of said premises; that he should demand possession thereof from the plaintiffs hereto; that the said Durkin and the defendant should then, in reality, purchase from the parties hereto, the property aforesaid and continue to operate the said business, thereby excluding the plaintiffs from their rightful interest therein.

"(6) That as a part and parcel of said scheme to defraud the defendant by reason of the representations aforesaid and not otherwise, procured the plaintiffs to enter into an agreement on the 22nd day of December, 1919, a true and correct copy of which is hereto attached marked Exhibit 'B' and made a part hereof, that the plaintiffs entered into said agreement solely and exclusively because of the fraudulent representations aforesaid and relying thereon and would not have entered into said agreement save and except for said representations."

Exhibit "B" referred to and made a part of the complaint, omitting the formal parts, is as follows:

"Whereas, the parties of the first part herein are the owners of an undivided one-fourth interest in and to that certain business known as the Imperial Billiard Parlors, situate at No. 415 Main avenue in the city of Spokane, county of Spokane, state of Washington.

"Whereas, the parties of the second part herein, have purchased from the parties of the first part herein, the entire interest in and to said business and all property of every kind, character and description belonging to the said parties of the first part, as evidenced by bill of sale this day executed by the parties of the first part to the parties of the second part herein; and,

"Whereas, it is the intention of the parties hereto to dissolve the partnership heretofore existing between the parties of the first part and the parties of the second part herein,

"Now therefore, in consideration of the sum of one ($1.00) dollar and other good and valuable considerations, the parties hereto do hereby agree that the partnership hereinbefore existing between the parties of the first part and the parties of the second part herein be, and the same is hereby dissolved, the parties of the second part herein assuming any partnership obligations as shown by the books of the company as of this date.

"It is further understood and agreed by and between William P. Ulrich and E. B. Stewart that whereas a contract has been entered into for the sale of said business as of February 1, 1920, that the partnership existing between the said E. B. Stewart and William P. Ulrich shall be dissolved as of said date and that the assets of said copartnership, after paying all debts and liabilities shall be distributed in equal portions to the said E. B. Stewart and William P. Ulrich."

The complaint charges the carrying out of the alleged scheme to defraud, and that the defendant and Durkin entered into possession of the business on

February 1, 1920, as equal owners, and have since conducted the same as such, deriving large profits, the share of which realized by the defendant up to the time of the filing of the complaint being about $100,000, and concludes with a prayer for an accounting; that the plaintiffs be decreed to be the owners of five-eighths of all profits accruing to the defendant from the business after February 1, 1920, and for general relief.

It is the contention of appellants that, notwithstanding the language of the contract of January 9, 1919, the partnership was not thereby terminated, and since the partners stood in a fiduciary relationship one to the other, any rights thereafter obtained by the defendant for his individual benefit to which the copartnership was entitled would be by him held in trust for the copartnership, a principle which we have heretofore approved in *Shrader v. Downing,* 79 Wash. 476, 140 Pac. 558, where it was said:

"It is undoubtedly the rule, as the appellant contends, that one member of a partnership must act in the utmost good faith towards his copartners, and that, if he purchases property for his individual benefit when the firm itself is entitled to the advantage of such purchase, or secures a valuable contract for himself which it was his duty to obtain for the firm, he will be treated as a trustee for the firm with reference to the transaction, and be compelled to account to his copartners for the profits acquired by reason thereof. But the rule does not absolutely prohibit a member of a partnership from engaging in enterprises in his own behalf, nor does it make all property acquired by a member of a partnership during its existence the property of the firm. The applicability of the rule depends on the facts of the particular case. One partner may not make a profit for himself individually out of the partnership business, or out of the transactions which he conducts privately which in justice and equity

ought to have been conducted in the partnership name; but he may, without laying himself liable to account, buy and sell real estate or other property with his individual means, if the transaction is disconnected from the partnership business, is not conducted in competition or rivalry therewith, and he is under no duty to conduct the transaction on behalf of the firm. Any other rule would prevent a member of a partnership from investing his private funds."

The general rule with reference to the renewal of a lease by one partner is well stated in 16 R. C. L. 906, where it is said:

"413. Partners.—The doctrine now under consideration has been frequently applied in partnership cases where one partner, without the knowledge of his copartner, has taken for his own benefit a renewal of a lease held by the firm, and in such cases the lease so taken inures to the benefit of the firm, the partner taking it holding as a constructive trustee. When the lease is held by a partnership, the chance or opportunity of renewal is in itself a distinct asset of the partnership in which all the partners have an interest, and where the partnership is for a limited time it is nevertheless held that one partner has no right as against his copartner to take a new lease to commence after the expiration of the partnership by its own limitations. Even if the old lease is in the name of one partner alone, he cannot, where it is affected with an equity in behalf of his copartner, secure a renewal to himself to the exclusion of his copartner, but the renewal is considered to be a graft upon the old stock. So where the rule is otherwise applicable it is immaterial that the new lease is on different terms from the old one, or for a larger rent. Even after dissolution of the partnership the equitable expectancy of renewal remains a partnership asset for the purposes of liquidation, to be taken into account and disposed of for the common benefit of the partners, and hence a renewal after dissolution of the firm, taken by less than all the partners, inures to the benefit of the firm. And where the dissolution of the partnership had been

agreed upon, due to dissensions, the fact that the complaining partner had attempted, under a mistaken belief as to his right, to acquire a lease in his own name has been held not to deprive him of the right to demand that the new lease acquired by the other partner be treated as belonging to the partnership. On the other hand, it seems that if the negotiations for the renewal of the lease by one partner in his own name and for his own benefit were open and aboveboard, he will not be denied the benefit of the lease, and it has been held that where frank and open negotiations for a renewal were in progress, but were incomplete at the time of dissolution of a partnership by the death of one of the partners, a renewal subsequently taken by the surviving partner in his own name did not inure to the benefit of the deceased partner's estate, and it was immaterial that the negotiations provided for the continuance of the lease to the surviving partner alone in case of the death of the other, there being no concealment or bad faith. Still it has been said that although it cannot be laid down that in no case can a partner during the partnership contract for a new lease to himself exclusively of property let to a partnership, it is very difficult (and especially as regards a managing partner) to make out such a case, and the mere announcement to his partners of his intention to apply for such a lease after the dissolution is not sufficient to exclude their interest."

But while we are in accord with those principles, they are not decisive of the point in issue, because it is not alleged that the respondent, Ulrich, had in fact secured a renewal of the lease; but from the complaint it appears that his possession of the premises in question is not an exclusive one, but is a joint possession with the owner for the purpose of conducting a business in which each are interested, the profits of which are to be divided between them.

Respondent contends that it is one thing for a partner to take a renewal of a lease in his own name which ought to have been taken in the firm name, and quite

another thing for him to defeat a renewal of the lease by inducing the landlord to deny a renewal; claiming that the averments of the complaint, when taken as a whole, charge the defendant with no more than defeating a renewal of the lease; arguing that, while equity will follow a renewal of a lease belonging to the partnership into the hands of one of the partners and treat it as the lease of the partnership, it will go no further, and that no court of equity, so far as the reported cases disclose, has ever treated the conduct of a partner in defeating a renewal of a partnership lease as the equivalent of the taking by him of a renewal lease. Industry of eminent counsel employed in the case has wholly failed to produce any direct authority pro or con upon this point.

It is further contended that the transaction complained of constitutes no moral wrong and no equitable wrong, in that the respondent Ulrich was proceeding in direct conformity with his legal and equitable rights, because the lease mentioned in the complaint expired on February 1, 1920, and in the absence of allegations to the contrary, the law will presume that the partnership was only for the duration of the lease. The complaint being silent as to the time when the partnership would terminate, we must assume that it would terminate with the lease, *Zimmerman v. Harding,* 227 U. S. 489, 57 Law Ed. 608, or that it might be terminated at will without giving rise to a cause of action to recover damages for its disruption. 20 R. C. L. 927, § 142. In either event, with the certainty that it must terminate February 1, 1920, or sooner if respondent so willed, the gist of the complaint is that respondent concealed the fact that he had made an agreement to conduct a similar business in the premises with, or for, Durkin, the owner, and thus procured

the execution of the second contract, which definitely terminated the copartnership and made disposition of its assets. Durkin is not a party here. He had an absolute right to renew the lease or refuse to renew the lease, and his motives cannot be examined into. So, too, after the termination of the copartnership, Ulrich had an absolute right to engage in any business he pleased, with whom he pleased, and owed no duty to advise his partners in advance of his affairs. All were equally advised as to the nature, extent and value of the good will of the business, and to what extent that value was based upon the occupancy of the leased premises, and the effect thereon of the removal of the business to such other premises as might have been obtainable. Durkin's refusal to renew the lease was a known fact, and his reasons therefor, or what induced them, were immaterial. The complaining partners chose, under the conditions, to settle the partnership affairs, as shown by the last agreement, rather than undertake to continue the business in a new location, or otherwise dispose of the partnership assets, presumably because they deemed such a course most profitable to them. At the most, even to permit a recovery of damages flowing from the wrongful act, it must be made to appear that Durkin was ready and willing to renew the lease, and would have done so but for some wrongful and fraudulent act or acts done by respondent for the purpose of preventing such a renewal, resulting as intended. No such acts being charged in the complaint, we are not here called upon to determine whether a cause of action could be based thereon, and nothing herein contained is intended to indicate any possible holding upon such a case.

In any event, there is in the complaint no averment of any fraudulent representations made by respondent to the appellants, or either of them, which induced

them to enter into the contract of December 22, 1919. At the most he is charged with remaining silent as to his alleged agreement with Durkin, when it was his duty to have spoken. Is not the duty to speak always predicated upon the fact that silence may mislead others to their injury, and if no injury can or does follow the silence, how can there have been a duty to speak? If respondent was silent it resulted in what? In an agreement to terminate the copartnership then about to expire by limitation, or which could have been terminated at any time at the will of any partner without giving rise to a cause of action for damages resulting from its disruption, and in the disposal of certain personal property belonging to the copartnership for what is alleged to be no more than "its actual cash value as second-hand goods at forced sale, with no allowance for the good will of said business." Do these facts show a cause of action? The answer must be in the negative, because the opportunity to continue the business in other premises, if available, was equally open to all, and if the business could not be continued, there was no use for or value in the good will, and without a continuance of the business and the use of the good will it cannot be assumed that the property sold was worth more than it is alleged to have been sold for.

If respondent had fully advised his partners of his agreement to enter into business relations with Durkin, and conduct a similar business in the same premises after the expiration of the lease and the partnership, how would their position have been altered, or what could they have done to bring about a better settlement? Knowledge of the facts could hardly have assisted them in inducing Durkin to renew the firm's lease; would not have enabled them to keep the part-

nership in being after February 1, 1920, or against the will of respondent; would not have enabled them to secure and retain the value of the good will of the business in any way except such as must have already been known to them, and consequently would not have enabled them to secure a greater price for their property sold. True, they might have refused to sell to respondent, or to Durkin, but there is no allegation or inference that they could have sold to better advantage to others.

We conclude that the complaint does not state a cause of action, and that the demurrer was properly sustained.

The judgment is affirmed.

PARKER, C. J., HOLCOMB, MAIN, and MITCHELL, JJ., concur.

[No. 16454. Department One. September 16, 1921.]

A. R. WALTER *et al., Appellants,* v. J. V. HOEFFLER *et al., Respondents.*[1]

TAXATION (140)—FORECLOSURE SALE—NOTICE TO OWNER—DILIGENCE. The statute (Rem. Code, § 9260) requiring the county treasurer to notify the record owner of real estate before its sale for delinquent taxes, while not requiring him at all hazards and in all instances to search out and notify the record owner, is imperative that he make at least a reasonable effort to find and notify such owner.

SAME. The owner of real estate is entitled to have a tax deed thereon set aside, where the treasurer has made a sale for delinquent taxes without notifying such owner whose post office address was of record in the treasurer's office, and was also capable of ascertainment from a tenant in possession of the premises; the fact that the owner himself may have been at fault not excusing the fault of the officer making the sale.

[1]Reported in 200 Pac. 1101.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J.,* entered January 22, 1921, in favor of the defendants, in an action to cancel a tax deed, tried to the court. Reversed.

R. A. Wilcox and *C. R. Hovey,* for appellants.

Eugene E. Wager, for respondents.

FULLERTON, J.—This is an action brought by the appellants, Walter, against the respondents Hoeffler, and the respondent Damerow, as treasurer of Kittitas county, to set aside a tax deed to lands issued by the respondent treasurer to the other respondents after a sale of the land for delinquent taxes. The trial resulted in a dismissal of the action.

The land in question consisted of a lot, with a dwelling house thereon, situated in the city of Cle Elum, in Kittitas county, and was formerly the residence of the appellants. They removed therefrom sometime in 1912, and took up their residence at Auburn, in King county, leaving the property in the hands of an agent who had authority to lease the same. At the time of the sale mentioned, the property was in the possession of a tenant. The taxes were suffered to become delinquent on the property for the years 1913, 1914, 1915 and 1916. The taxes for 1917 were paid by the appellants on May 31, 1918, a time prior to their delinquency. At that time the treasurer issued a receipt for the taxes paid, on the face of which the post office address of the appellants was written. A duplicate of the receipt, also showing the address, was retained by the treasurer and made a file of his office.

In September, 1919, the treasurer, in making up a list of the property in his county on which the taxes had been delinquent for such time as to require their sale, discovered and listed the property here in ques-

tion. He thereupon addressed a letter to the appellant A. R. Walter, at Cle Elum, in which attention to the delinquency was called. This letter was returned from the post office at Cle Elum as undelivered. The treasurer thereafter, by appropriate proceedings, took the necessary steps to procure a judgment of foreclosure for the delinquent taxes, and such a judgment was entered by the superior court on August 16, 1920.

Relating to the duties of the county treasurer subsequent to the entry of the judgment, the statute provides that the treasurer, upon receiving a certified copy of the judgment from the clerk of the court in which it is entered, shall, before any sale of real estate is held thereunder, "notify the record owner of such real estate of the pending sale, or in case of unknown owner shall post a notice of same in some public place at the county court house." Rem. Code, § 9260. The treasurer, relying on the fact that the letter addressed to one of the appellants at Cle Elum a year before had been returned as uncalled for, proceeded with the sale of the property without making further effort to locate or notify the appellants, or either of them.

The statute from which we have quoted is imperative in its requirement that the treasurer shall, before proceeding with a sale of land for delinquent taxes, notify the record owner of the land of the pending sale. This possibly does not mean, and we are not inclined to hold it means, that the treasurer must in all instances and at all hazards search out and notify the record owner of a pending sale before he may proceed with a sale, but it certainly requires that he make at least a reasonable effort to find and notify such owner. See *Larson v. Murphy*, 105 Wash. 36, 177 Pac. 657. Treating this as the controlling question, the inquiry is, did the treasurer make such reasonable effort. It is our opinion that he did not. The name of the record owner

of the property not only appeared on the tax rolls in his office, but it appeared on the very judgment roll under which he was authorized to make a sale. The post office address of the record owner was of record in his office, at a place with which he was familiar, and to which he could turn with hardly a passing effort. The land was in possession of the owner's tenant and inquiry there would have revealed the whereabouts of the owner. Manifestly, it seems to us, failure to inquire at these obvious sources is failure to exercise reasonable diligence.

The argument that the appellants were in themselves at fault is beside the question. The statute makes the giving of the notice a condition precedent to the sale, and a substantial compliance therewith is necessary in all cases if title to real property is to pass under the procedure. Fault of the officers making the sale cannot be offset by showing fault of the owners of the property sold.

The judgment is reversed, and the cause remanded with directions to grant relief in accordance with the prayer of the complaint.

HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 16464. Department Two. September 16, 1921.]

FREDA W. HEMRICH, *Respondent*, v. AMELIA HEMRICH *et al.*, *Appellants*.[1]

TRUSTS (38½)—ACTIONS—EVIDENCE—BURDEN OF PROOF. The burden of proving immaculate faith in transactions between a trustee and a *cestui que trust* rests upon the trustee, especially where the *cestui que trust* is of immature age, judgment and experience.

TRUSTS (46, 47)—ENFORCEMENT OF TRUST—RIGHT TO TRUST FUNDS—FRAUD OF TRUSTEE. Undue influence and constructive fraud is shown supporting an action by the widow of the *cestui que trust* to recover a trust estate, where it appears that a mother, who had been made trustee of an estate under the will of her deceased husband, whereby two-thirds was devised to the children, induced a child of no business experience or judgment, and who was under her influence, to convey his entire interest, amounting to practically $100,000, to her without other consideration than that of support and the prospect of sharing in the mother's estate on her death.

SAME (49)—ACTIONS TO ENFORCE TRUST—LIMITATION AND LACHES. A delay of four years in bringing action to set aside a conveyance procured by parent from child by means of constructive fraud and undue influence does not amount to laches when no injury has been caused by not beginning the action earlier.

WILLS (79-85)—RIGHTS OF DEVISEES—DEED TO EFFECT TESTATOR'S INTENTION—CONSIDERATION. Where a brother, without consideration, conveyed all his interest in a certain piece of property to his sister, in order to carry out an expressed intention of the deceased father to give that property to his daughter, such deed could not be afterwards set aside at suit of the administratrix of such brother.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 30, 1920, upon findings in favor of the plaintiff, in an action to recover an interest in an estate, tried to the court. Modified.

Peters & Powell and *Greene & Henry*, for appellants.

John B. Hart and *F. C. Kapp*, for respondent.

[1]Reported in 201 Pac. 10.

MACKINTOSH, J.—This action is to recover an interest in the estate of Andrew Hemrich, deceased. Andrew Hemrich died in the city of Seattle on May 2, 1910, possessed of an estate which was worth in the neighborhood of $600,000. There survived him his widow, Amelia Hemrich, and five children: John, Alvin, Ernest, Katherine and Carl. All of these except Carl are living and are parties defendant in this action. Katherine is now married to Wilbur W. Scruby. By the terms of the will, one-third of the estate was left to the widow and the other two-thirds were devised to the five children to "be divided between the said children share and share alike, each of said children to come into possession as follows: each of my sons when he shall arrive at the age of 25 years and my daughter . . . when she shall arrive at the age of 21 years." Under the will the widow, deceased's brother, and the son John were appointed executors and trustees. The will further provided for the support, maintenance and education of the children from the funds of the estate. Carl was the youngest of the children and attained his 21st birthday on July 18, 1915. In May, 1917, he was married to the plaintiff in this case, and on November 28, 1918, Carl died, not yet having arrived at the age of 25 years. Carl's widow is claiming a two-fifteenths interest in the estate as heir and administratrix of her deceased husband. In 1911, all of the children except Carl, having then arrived at their majority, conveyed all their interest in their father's estate to their mother, and on August 28, 1915, which was 41 days after arriving at his majority, Carl conveyed his interest in his father's estate to his mother. The deed of conveyance was not filed for record until March 16, 1917. He conveyed to the Andrew Hemrich Investment Company, which was in

effect a conveyance to his mother, as will appear by a further recitation of the facts in regard to the incorporation of this company. In November, 1910, the Andrew Hemrich Investment Company was incorporated, to which, as already stated, the widow and all the children except Carl conveyed their respective interests in their father's estate. The capital stock of the company was used in payment of these transfers, and the shares of stock which were issued to the children were indorsed by them and delivered to their mother. These conveyances and transfers vested the title of these children in their mother.

On November 8, 1911, the executors under the will filed their final account and petition for distribution in which it appeared that the widow and the four children had transferred all their interest to the Andrew Hemrich Investment Company, and that the eldest child, John, was the only one who had then arrived at the age of 25 years. The petition asked that the one-third of the estate devised to the widow should go to the Andrew Hemrich Investment Company, as also should John's share, and that the shares of Alvin, Ernest and Katherine, who were of age but not yet 25 years, and Carl, who was not then of age, should be distributed to the trustees under the will; the shares of Alvin, Ernest and Katherine to be held by these trustees until these children should each arrive at the age of 25 years, when their shares should be turned over to the Andrew Hemrich Investment Company, and as Carl was yet a minor and had made no transfer to the investment company, the disposition of his share of the estate was not referred to. The order of distribution was made as prayed for on September 5, 1913. On August 10, 1915, eighteen days before the conveyance by Carl to the investment company, he

received from his mother two checks, aggregating $5,260, and on September 16, 1915, he received a further check from his mother of $2,640, which amount, however, he shortly afterwards repaid. All of this money was derived from income from the various properties of the estate.

On March 19, 1917, the investment company was dissolved for the reason that it had served its purpose, and the widow being the sole owner of all its stock, which represented the entire estate of her deceased husband, there existed no longer any reason for the continuance of the corporation, and its assets were turned over to her. This deed from the investment company was dated the same day the petition for dissolving the corporation was filed. In January, 1919, occurred the first denial of respondent's interest in the estate, which was followed by a formal demand in September, 1919, for that share.

The above is a recital of the main facts in the case which show the manner in which the entire estate of Andrew Hemrich, deceased, came into possession of Amelia Hemrich, his widow, devisee, executrix and trustee under the will, and are the facts upon which she now claims to be the sole owner in her own right of all the estate.

The complaint, among other things, alleges that the defendants, through fraud and undue influence and conspiracy, prevented the distribution to the respondent of Carl's share of his father's estate. It further alleges that the property was taken in trust for Carl by the defendants. The answer denies that there is any trust and alleges that Carl, after arriving at the age of 21 years, and before his marriage to the plaintiff, conveyed all his interest to the Andrew Hemrich Investment Company as a gift to his mother. The re-

ply alleges that, when Carl made his conveyance, he was not yet 25 years of age, and consequently he had no interest in his father's estate vested in him at that time that he could alienate, and that the conveyance was therefore void; the allegation is repeated that the conveyances were obtained from Carl by fraud, misrepresentations and undue influence, and that the conveyance by Carl was made in trust; and further, that, under the terms of the will, the property was to be held for him by his mother in trust. There are a couple of other matters involved in this appeal which we will refer to at the close of this opinion, but the statement of them here would only complicate the examination at this point.

The trial, in which an enormous amount of evidence was produced, resulted in a decree awarding the respondent judgment against the appellants, executrix and executors and trustees under the will, in the sum of $75,284.87, and directed that the conveyance made by Carl in his lifetime to the Andrew Hemrich Investment Company be cancelled on the ground that it was void.

The first question presented by the pleadings and the evidence in the case is whether, at the time that the transfer was made by Carl, he had an interest in his father's estate which had become vested and which was alienable by him. The industry of counsel has resulted in the collection of a great many authorities bearing upon this question, but in view of the point upon which this case must ultimately turn, it is unnecessary to review them in this opinion, and we may here tentatively adopt the theory of the appellants that the language of the will is not ambiguous, and that under the sixth paragraph Carl took a vested interest immediately upon his father's death, which interest he could alienate

before he arrived at the age of 25 years, and it may furthermore be assumed for the purpose of this case that there was no devise by implication to Carl's widow.

The contention by the respondent that the conveyance by Carl was an express trust conveyance to his mother may also be assumed for the purpose of this case to be unfounded, and it is therefore unnecessary to discuss the great number of authorities bearing upon the question of whether parol evidence was admissible to establish such a trust, and we may pass to the question that is determinative of the controversy.

The evidence shows that Carl, at the time he arrived at the age of 21 years, was residing with his mother in her home; that he had never been engaged in any self-supporting pursuit or vocation; that neither by mental attainment nor education was he fitted for any particular line of endeavor; that his business judgment and experience were nil; that he was what might be called the typical son of a self-made man, from whom he might inherit a fortune, but not the native ability which created it. He was dependent entirely upon his mother for whatever spending money he had and was under her control and domination; he was, as she expressed it, "a good boy"; having a true filial regard for his mother, obedient to her discipline and unquestioning her authority, which although not asserted in any rigid manner, was possibly, on that account, the better observed. He was familiar with the fact that his brothers and sisters had placed their share of his father's estate in the mother's hands, and although death has deprived us of his testimony, it is only fair to believe that the entire atmosphere of the family relationship compelled him to do likewise. His share, which amounted at the time well towards $100,-

000, was transferred for nothing, if we are to believe the appellants' position; transferred without any assurance that ultimately he might not be the object of charity; in fact, if he was to continue living in the same manner in which he had been reared, he must thereafter, of necessity, be the subject of his mother's bounty, and must await her death before receiving any independent resources, and take chances on what they might amount to. The receipt by Carl of some $5,000 on or about the time of this conveyance is not contended by the appellants to have been a consideration for the transfer by him of his estate, and, in fact, it could not be so, in face of the provisions of the will which called for his support and maintenance, and from the further fact that the money was paid out of the income of the estate, which included Carl's share thereof, and from the further fact that the receipt of this money was not unlike the receipt by the other children of similar amounts. It is not necessary to characterize the lack of documentary evidence which might be of assistance in determining the matters in controversy, nor to analyze and determine the motives which prompted some palpable alterations in records which were actually produced, and the condition in which others appear among the exhibits, nor to speculate upon the conduct at the time of Carl's illness and death.

The rule—and it is a salutary one—which compels courts to scrutinize with caution transactions between trustees and the *cestui que trust,* and to lay upon the trustee the burden of proving immaculate faith, when title of the *cestui que trust* is found in the trustees, and especially where that *cestui que trust* is of immature age and judgment and experience, is a rule to which the facts of this case imperatively demand the application.

Under this nonintervention will the mother became one of the trustees for Carl (*Newport v. Newport,* 5 Wash. 114, 31 Pac. 428; *Smith v. Smith,* 15 Wash. 239, 46 Pac. 249; *In re Cornett's Estate,* 102 Wash. 254, 173 Pac. 44); and under the decree of distribution she was referred to as a trustee. The rule which we have indicated is supported by a veritable Sinbad's treasure trove of legal authorities, and has been so well stated by so many courts and text writers that it is difficult to refrain from extensive quotation.

The supreme court of Virginia, in *Branch v. Buckley,* 109 Va. 784, 65 S. E. 652, quoted from sections 956 *et seq.,* Pomeroy's Equity Jur. as follows:

"While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption . . . The court will not allow the transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so entrusting him. . . .

"The transaction is not necessarily voidable. It may be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. . . . 'A purchase by a trustee from his *cestui que trust* even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit is generally voidable and will be set aside on behalf of the beneficiary; it is at least *prima facie* voidable upon the mere facts thus stated. There is, however,

no imperative rule of equity that a transaction between the parties is necessarily, in every instance voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show by unimpeachable and convincing evidence that the beneficiary being *sui juris* had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might with reasonable diligence, have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity. The doctrine is enforced with the utmost stringency when the transaction is in the nature of a bounty conferred upon the trustee—a gift or benefit without full consideration. Such a transaction will not be sustained, unless the trust relation was for the time being completely suspended, and the beneficiary acted throughout upon independent advice, and upon the fullest information and knowledge.' "

And the court in that case added:

"Under well established principles of equity, independent of the question of actual fraud, transactions between parties occupying the relation to each other which existed between the appellant and complainant at the time the former acquired title to the trust subject are at least *prima facie* fraudulent."

Perry, Trusts (5th ed.), §§ 194, 195, 197, 427, and 428, in a luminous presentation of this phase of the law, says, *inter alia:*

"Sec. 194: . . . Thus, if a parent buys property of his child, a guardian of his ward, a trustee of his

cestui que trust, an attorney of his client, or an agent of his principal, equity will either avoid the contract altogether, without proof, or it will throw the burden of proving the fairness of the transaction upon the purchaser; and, if the proof fails, the contract will be avoided, or the purchaser will be construed to be a trustee at the election of the other party. The ground of this rule is, that the danger of allowing persons holding such relations of trust and influence with others to deal with them is so great that the presumption ought to be against the transaction and the person holding the trust or influence ought to be required to vindicate it from all fraud, or to continue to hold the property in trust for the benefit of the ward, *cestui que trust,* or other person holding a similar relation. . . ."

"Sec. 195: These principles are applied in their full vigor to all contracts and sales between trustee and *cestui que trust.* The trustee is in such a position of confidence and influence over the *cestui que trust,* that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust,* unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust.* The presumption is against the transaction. . . . The general rule is, that the trustee shall not take beneficially by gift or purchase from the *cestui que trust,* even although the supposed trustee and purchaser is a mere intermeddler and not a regularly recognized trustee; the question is not whether or not there is fraud in fact, the law stamps the purchase by the trustee as fraudulent *per se,* to remove all temptation to collusion and prevent the necessity of intricate inquiries in which evil would often escape detection, and the cost of which would be great. The law looks only to the facts of the relation and the purchase. The trustee must not deal with the property for his own benefit. . . . And it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information, or ignorance of the facts or of his rights on the part of the *cestui* or any inadequacy of price, will make such a purchaser a constructive trustee. . . . "

"Section 197: It is thus seen that the rule against purchasing by trustees, of the *cestui que trust,* amounts almost to prohibition. . . ."

"Section 427: . . . No other rule would be safe; nor would it be possible for courts to apply any other rule, as between trustee and *cestui que trust.* . . ."

"Section 428: . . . Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust.* The better opinion, however, is, that a trustee may purchase of the *cestui que trust,* or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity."

The strength of the position indicated by these authorities cannot be increased by reciting from the legion of additional authorities: *Michoud v. Girod,* 45 U. S. 502; *State v. Culhane,* 78 Conn. 622, 63 Atl. 636; *Butman v. Whipple,* 25 R. I. 578, 57 Atl. 379; *Keith v. Kellam,* 35 Fed. 243; *Swift v. Craighead,* 70 Atl. (N. J.) 666; *Reeder v. Meredith,* 78 Ark. 109, 93 S. W. 558; *Gassert v. Strong,* 38 Mont. 18, 98 Pac. 497; *Clay v. Thomas,* 178 Ky. 199, 198 S. W. 762.

The principle has been recognized by this court in *Gardella v. Meeker,* 3 Wash. Terr. 178, 13 Pac. 709; *O'Neile v. Ternes,* 32 Wash. 528, 73 Pac. 692; *In re Goss' Estate,* 73 Wash. 330, 132 Pac. 409; *Stewart v. Baldwin,* 86 Wash. 63, 149 Pac. 662. Nor, as we read them, do the cases of *Couchman's Adm'r v. Couchman,* 98 Ky. 109, 32 S. W. 283; *Gifford v. Thorn,* 9 N. J. Eq. 702; and *Williams v. Canary,* 249 Fed. 344, establish any other principle.

Under this rule the fact that the trustee is found in possession of the property of her *cestui que trust* places upon her the burden of showing the utmost good

faith. The testimony in this case establishes no such situation.

However strong the rule may be in denying to the trustee the right to acquire the property of the *cestui que trust* without full consideration and free from the slightest taint of suspicion, the courts are just as alert to set aside unconscionable transactions between parent and child. The supreme court of Illinois, in the case of *White v. Ross,* 160 Ill. 56, 43 N. E. 336, had before it an action resembling the situation presented in this case, and at the expense of lengthening this opinion to an almost unwarranted length, we will quote from that decision:

"The third ground or proposition upon which the decree is sought to be sustained, and the one which we find is sustained by the evidence, and supported by abundant authority, may be stated thus: That at, and before, and after the time or times when the deeds in question were made and delivered, the relation of parent and child existed in its full vigor between the mother, Ann White, and the daughter Annie C. White; that the position of the mother was one of dominance and authority over the daughter, and of the daughter of dependence upon the mother; that the daughter confided in and trusted her mother implicitly; that the mother was already possessed of an abundance of means for her own support—even of wealth—and that the property conveyed to the mother by the daughter was of large value, exceeding $200,000, and embraced her entire estate, and substantially all her means of support; that the daughter was an invalid, without any business, occupation or profession, wholly unacquainted with business affairs and the forms and instrumentalities by which conveyances of property are made from one person to another, and wholly unable, by reason not only of bad health but of lack of business education, training and experience, to earn her own living; that nothing was paid or agreed to be paid to the daughter Annie C. White for all the vast property so conveyed; that she had no independent

advice, and did not understand that she was divesting herself absolutely of all her property rights; that the gift was improvident and unreasonable on the part of the daughter to make, and unconscionable on the part of the mother to accept; and that under such circumstances the presumption of undue influence arises, and that the conveyances in question were obtained by undue influence of the mother over the daughter; and that the burden of proof is on the mother, and those claiming under her, to show that the daughter acted independently, advisedly and of her own free, intelligent will and accord, uninfluenced by the recipient of so munificent a gift, and, no such proof having been made, that, independently of any question of actual fraud, the transaction must be held to be constructively fraudulent, and that a court of equity will raise a constructive trust, and fasten it upon the conscience of the holder of the legal title, and convert such holder into a trustee, for the party who, in equity, is regarded as the beneficial owner.

"The ultimate facts stated in the last proposition are established by the evidence in this case, and are in substantial accordance with the findings of the two chancellors who, on different trials, heard the case below on both oral and written testimony. That such conveyances of property, made under such circumstances are presumably voidable there can be no reasonable doubt. This rule in equity is established by the great weight of authority both in England and this country, and is founded on principles of justice and morality. . . . In such cases courts of equity will interfere upon grounds of public policy, or, as often stated, for the preservation of mankind, and, unless the donee can show affirmatively that the transaction is a 'righteous one' it will be set aside.

"It is contended by the appellants that such is not the rule in this country, but that the parental authority over the child is only a circumstance to be proved with others tending to establish undue influence; that, notwithstanding a conveyance or gift be shown to have been made by the child to the parent at a time, though of full age, when the child was under the dominion

of the parent, still the transaction cannot be impeached without some affirmative proof of the exercise of undue influence on the part of the parent, or that the parent was guilty of some fraud, imposition or wrongdoing in obtaining the advantage bestowed; and it is claimed that their contention is supported by the authority of the supreme court of the United States in *Jenkins v. Pye,* 12 Pet. 241. . . .

"In *Jenkins v. Pye* the father paid a valuable, though, perhaps, an inadequate consideration for the property conveyed, and the doctrine of *laches* was also applied as a ground for denying relief. In a separate opinion, Mr. Justice Catron, while concurring in the decision of the case on the ground of *laches,* took issue with the opinion of the court delivered by Mr. Justice Thompson on the other branch of the case. In the subsequent cases of *Taylor v. Taylor,* 8 How. 184, and *Allore v. Jewell,* 94 U. S. 506, the doctrine as announced by the same court does not materially differ from the general current of authority on the subject, and the question of unreasonableness and unfairness in the transaction is made to cut an important figure. Judge Story, in his work on Equity Jurisprudence, (vol. 1. sec. 309,) says 'The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter, and therefore all contracts and conveyances whereby benefits are secured by children to their parents are objects of jealousy, and, if they are not entered into with scrupulous good faith, *and are not reasonable under the circumstances, they will be set aside,* unless third persons have acquired an interest under them.' So in Perry on Trusts it is said, that while courts of equity will scrutinize conveyances of property by children to their parents, they are not *prima facie* void, but that there must be some affirmative proof of undue influence or other improper conduct to render the transaction void. But it is also said that 'the position and influence of parent over a child are so controlling that the transaction should be carefully examined, and sales by a child to a parent *must appear* to be fair and reasonable.' So,

also, in Hill on Trustees, 157, it is said that 'every contract or conveyance whereby benefits are secured to parents by their children must be perfectly fair and reasonable in all its terms and circumstances, or otherwise it will be set aside.' It is true, the author says that before this will be done it will be necessary to prove the exercise of undue influence, or to establish some other case of actual *or constructive fraud* against the parent. So, too, in the citation from Newland on Contracts, the author makes the reasonableness of the transaction an important element. It is there said that equity has refused to interfere because of the mere relation of parent and child, especially where the agreement was reasonable, or entered into to effect a laudable purpose. In *Oliphant v. Liversidge,* 142 Ill. 160, 30 N. E. 334, this court in sustaining a deed of gift from father to child said (p. 170): 'Nor does any presumption of fraud arise from the fact that the grantor is the father of the grantees. In the case of a gift from a child to a parent undue influence may be inferred from the relation itself, but never where the gift is from the parent to the child.' In *Finucan v. Kendig,* 109 Ill. 198, and *Patterson v. Johnson,* 113 Ill. 559, this court distinctly recognized the question of unreasonableness and improvidence in the transaction as an element to be considered in determining its binding force upon the parties. In the latter case such facts and circumstances were proved as showed the transaction a reasonable and proper one, and this court said (p. 572): 'The record shows that there was no influence whatever used by the father to procure the deed, and that it was made by the daughters of their own volition. The making of the deed was a graceful tribute of filial affection.'

"If a child possessing wealth should while under parental control, though past minority, make a deed of gift of property of substantial value to his indigent parent, sufficient to maintain such parent in comfort, and even elegance, the remainder of his life, but reserving sufficient for his own needs, thus eliminating from the transaction all improvidence, all unreasonableness, and all apparent unconscientiousness on the

part of the parent, it might be justly contended that the rule would be a harsh one that would cast the burden of proof on the parent, or on those claiming under him, to prove that no undue influence was resorted to to obtain the gift. But where, as in this case, the transaction appears to have been an improvident and unreasonable one for the child to enter into, and one apparently involving the taking of an unconscionable advantage by the parent, in accepting and retaining the property, there can be no doubt, from the standpoint of any well-considered case, that the burden of proof is cast upon the parent to prove that the transaction was, in the language often used, 'a righteous one.' "

See, also, *Taylor v. Taylor,* 8 How. (U. S.) 183, where the supreme court of the United States, in a long opinion, reviewed the theory involved here and stated the rule with extreme clarity and force, saying:

" 'But when such a relation (the fiduciary one) does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance.' . . .

"It is shown that the grantor in this deed, though of age, had little more than attained to majority; that she was living in the house with her parents—her only home; and may fairly be presumed to have been liable to the influence of feelings and habits which, in the absence of contravening evidence, would control the dispositions and conduct of a youthful female thus situated. She might be moulded to almost anything, in compliance with the earnest wishes (with her habitually yielded to as commands) of her parents. . . .

"And it has been argued that, with her knowledge of the situation of her parents, the impulses of filial duty and affection might of themselves have formed a sufficient groundwork for the complainant's conveyance. However hazardous it might be to prescribe, as a rule of right or of property, imperfect obligations which the

law does not originally enforce, this argument can be deemed satisfactory in instances only in which the motives supposed to enter into such obligations are shown to have been free and unconstrained in their operation. In the present instance, too, independently of the influences which will be shown to have been brought to bear upon the transaction, it is thought that the injunctions of filial duty and affection would have demanded something less than the surrender of all possessed by the grantor. . . . Nay, it would seem that proper *parental* tenderness, and solicitude for the welfare of the child, or the true principles of rectitude and fairness, would have permitted nothing beyond this. . . ."

See, also, *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571; *Walters v. Walters,* 26 N. M. 22, 188 Pac. 1105, and this court's opinion in *Muzzy v. Tompkinson,* 2 Wash. 616, 27 Pac. 456, 28 Pac. 652. This appears in the *Muzzy* case, *supra*:

"If we seek undue influence in this case, it is easily found. . . . Of reasonableness in this arrangement there was none, unless it be considered reasonable in every case for a father to take from his child her real estate without consideration. . . ."

So here, the burden being upon Mrs. Hemrich to show that her acquisition of Carl's property was proper, she has not sustained it. The whole transaction, with all its surrounding circumstances, and the testimony offered in support of it, must convince a court of equity that, while there may not have been actual fraud, there was undue influence and constructive fraud, and that the trial court was correct in determining that Carl's share of the estate should go to the respondent.

As to the value of that share, the record is bulging with testimony directed to the correct valuation of the estate, and after a painstaking review of it, we cannot

say that the trial court did not arrive at the correct amount, although there is considerable room for argument that it might correctly have been increased to a considerable extent.

Laches is urged against the respondent's action, and the case of *Jenkins v. Pye,* 12 Pet. (U. S.) 241, where there had been a twenty years' delay, and *Ripple v. Keuhne,* 100 Md. 672, 60 Atl. 464, where one of eight years had occurred, are cited as authorities, but we find here no delay in asserting Carl's rights and no injury has been caused by not beginning an action earlier than was done.

We will now pass to two other questions which are presented by the record.

The lower court allowed a personal judgment against Amelia Hemrich in the sum of $10,000, arising from the sale by her of what was known as the Capital Hill home property, the proceeds of which she distributed by giving each of the children the sum of $10,000. The books show that the cash payments were made to all but Mrs. Scruby and Carl, and the testimony as to them is that they did not desire the cash, but allowed the mother to keep it and pay them six per cent interest on it. This testimony is contradicted, but as we read it, we are not inclined to disagree with the conclusion arrived at by the trial judge, who was more advantageously situated to pass upon its credibility than we.

The next minor point urged by the appellant is that the judgment in favor of the respondent against Katherine Scruby and her husband, based upon a deed made by Carl to his sister after he arrived at his majority was erroneous. The court held this conveyance was without consideration and void. We are of the belief, from the testimony, that Andrew Hemrich had

expressed, during his lifetime, his intention of giving a certain piece of property to his daughter, and that in furtherance of this intention the Andrew Hemrich Investment Company executed this deed, and Carl, when he arrived at the age of 21, in order to complete his sister's title, gave his deed to her, and although this was without consideration, we do not think that it is the basis of a judgment against Mrs. Scruby, and the action of the trial court in granting such judgment is reversed.

Upon the whole record, the superior court's judgment is affirmed, except as to the judgment against the Scrubys on the lot received by deed from Carl. The respondent is allowed costs against all the appellants except the Scrubys, who are awarded costs in the sum of $100 against the respondent.

PARKER, C. J., MITCHELL, and TOLMAN, JJ., concur.

[Nos. 16627, 16628. Department Two. September 16, 1921.]

THE STATE OF WASHINGTON, *on the Relation of George Hart, Respondent,* v. GUY E. KELLY *et al., Appellants.*[1]

APPEAL (236, 237)—SUPERSEDEAS — AMOUNT OF BOND — APPEALS FROM MANDAMUS AND INJUNCTION. Under the rule that, in fixing the amount of a supersedeas bond, it is necessary to take into consideration the amount of loss that may be sustained if an adequate bond is not given, supersedeas bonds in the sum of $50,000 each, in an injunction suit involving $47,000 worth of liquid assets of a corporation, and in a mandamus suit involving the disposition of corporate stock valued at $37,000, are not excessive in amount.

Application filed in the supreme court July 16, 1921, to require the superior court for King county, Dyke-

[1]Reported in 201 Pac. 7.

man, J., to reduce the amount of supersedeas bonds. Denied.

Kelly & MacMahon, for appellants.

Wright, Kelleher, Allen & Hilen, for respondent.

MAIN, J.—These two cases, while not formally consolidated in the trial court, are so closely allied that they will be considered as one. In each case there is an application to require the trial court to reduce the amount of a supersedeas bond. In one, George Hart petitioned the superior court for an injunction. In the other, he made application for a writ of mandamus. The cases came on for hearing in the trial court at the same time, and resulted in the issuance of a permanent injunction in one case and a writ of mandate in the other. After the judgment was entered, an application was made to fix the amount of the supersedeas bonds, which resulted in the trial court's fixing the amount of the bond in each case at $50,000. It is claimed that these bonds are unreasonable in amount, and, as already stated, the applications here are to require the trial judge to fix bonds in a lesser sum. A somewhat comprehensive statement of the facts will be necessary in order to determine whether the trial court fixed the bonds in an unreasonable amount.

One David Hart, during his lifetime, caused to be incorporated, under the laws of this state, the David Hart Company, with a capital of $50,000, divided into five hundred shares of the par value of one hundred dollars each. After this corporation was formed, Hart transferred to it all of his property, both real and personal. Prior to his death, he made a will by which he bequeathed the stock of this corporation to his children in various amounts. To the daughter, Bernice Hart Smith, he gave approximately one-half thereof.

To the other five children there was bequeathed the balance of the stock in various amounts. After the testator died and the will had been admitted to probate and the estate was in process of administration, the children, other than Mrs. Smith, were dissatisfied with the provisions of the will. The instrument contained a provision that, if any of the beneficiaries thereunder should attempt to contest it, such beneficiary would thereby forfeit to the other beneficiaries all that he or she was to receive under the will.

While the estate was in process of administration, the children, other than Mrs. Smith, claimed that they entered into an oral agreement with her whereby they would refrain from instituting a contest of the will, providing that she would distribute a sufficient number of shares of the stock which went to her among the other children so that each would share equally. This agreement was not carried out, and after the time had expired when the contest of the will might be instituted, was repudiated by Mrs. Smith. Thereupon, George Hart, one of the sons of David Hart, the testator, took an assignment from each of the other children and brought an action in his own behalf and on their behalf for damages against Mrs. Hart Smith on account of her failure to carry out the oral agreement. This action went to trial before the court and a jury, and resulted in a verdict in favor of the plaintiff in approximately the sum of $37,000. At about the time judgment was entered upon the verdict, and prior to the levy of an execution, Mrs. Smith pledged her stock, two hundred fifty-nine shares, to the Citizens State Bank of Auburn, to secure an indebtedness of approximately $9,000, and also to secure an indebtedness to Guy E. Kelly and E. S. McCord in approximately the sum of $10,500. The certificate evidencing

the ownership of the stock was placed in physical possession of the bank, where it has since remained.

After the entry of judgment in the action brought by George Hart and the issuance of an execution thereon, Messrs. Kelly and McCord brought an action to restrain the levy upon and sale of the certificate of stock which was then in the Auburn State Bank. This action was tried and injunctive relief was denied and no appeal was prosecuted. The judgment in the principal action was entered on March 21, 1921. After the injunction suit referred to had been determined adversely to the plaintiffs, the stock of Mrs. Smith was levied upon and sold on April 23, 1921, and was purchased by George Hart, subject to the above mentioned liens against it, for the sum of $10,000. After the execution sale, Mrs. Smith owned no stock in the company and Mr. Kelly owned one share.

On April 25, 1921, and after the stock had been sold upon execution, George Hart, the plaintiff in the original action, brought an injunction suit against Guy E. Kelly and Bernice Hart Smith, the trustees of the David Hart Company, to restrain them from in any manner disposing of, dealing with, or changing any of the assets of that corporation. On April 26, 1921, George Hart instituted a mandamus action to require the trustees of the David Hart Company to call a meeting of the stockholders of the company, and on May 10, 1921, instituted another mandamus action to require them to issue to him a certificate of stock, subject to the rights of the lien claimants above mentioned, and to make the proper entries upon the corporation books. These actions all came on for hearing at the same time. In the injunction action the defendants, the trustees of the David Hart Company, consented that an injunction might be issued pending the litigation. An order was thereupon entered restrain-

ing the defendants from in any manner disposing of, dealing with, or changing the assets of the corporation. The mandamus actions were contested and resulted in orders directing that writs issue as prayed for. Notices of appeal were given in the injunction action and in each of the mandamus actions.

After the injunction decree had been entered and the writs of mandate directed to be issued, Mrs. Smith and Guy E. Kelly, the trustees of the corporation, made application to the trial court to have the amount of the supersedeas bonds fixed. This application resulted in an order of the trial court fixing the supersedeas bond in the injunction suit at $50,000, and in the mandamus at $50,000. The trustees of the corporation, being of the opinion that these bonds were excessive, made the present applications to this court seeking an order directing the trial court to reduce them.

Without deciding, it will be assumed that, if the trial court arbitrarily or capriciously fixes a supersedeas bond in unreasonable amount, this court, in aid of its appellate jurisdiction, will cause the amount of the bond to be fixed in a reasonable sum. In the injunction suit, as above stated, the trustees of the corporation are restrained from disposing of or dealing with the assets of the corporation. The trial judge, in his return to the applications here made, states:

"Answering paragraph 11 thereof, the said Everett Smith alleges that at the time of the trial of this cause in the court below, undisputed evidence disclosed that the liquid assets of David Hart, Inc. (outside of land owned by the said corporation) amounted to the total sum of approximately $47,000, made up of mortgage loans, conditional sales contracts, Liberty Bonds and about $7,000 in cash. Undisputed testimony in said cause also further disclosed that the cash and securities had been removed from the banks where the cor-

poration had transacted its business and had been deposited in places unknown to the petitioner George Hart or to any of his associates, and that any information with respect to said assets had been denied by the respondents herein to the petitioner and to all of his associates. Undisputed testimony further disclosed that the respondent, Guy E. Kelly, had, after the rendition of judgment in said cause numbered 143340, advised Bernice Hart Smith, the other respondent herein, to place the assets of the corporation beyond the reach and control of the petitioner George Hart and his associates, so that their ownership of said corporation, even in the event of an affirmance of the judgment in the Supreme Court, would avail them nothing."

By this return it is shown that the liquid assets of the David Hart Company were approximately $47,000, and that the trustees of that company, since the rendition of the judgment in the principal action, are removing such assets in order that, if the judgment against Mrs. Smith should be affirmed, it would not avail George Hart and his associates anything. It thus appears that the amount of damages which would be sustained by the disposition of the liquid assets would be the sum of $47,000. In the mandamus action there is involved a certificate of stock for two hundred fifty-nine shares of the corporation stock which is subject to liens in approximately the sum of $20,000. Based upon the finding of the jury as to the amount of damages in the principal action, the value of the stock is approximately two hundred dollars per share. It would have been necessary for Mrs. Smith to distribute to her brothers and sisters approximately one hundred seventy-three shares of the stock, in order that each should share equally. For failure to do this the jury returned a verdict of approximately $37,000.

An appeal was taken from the judgment entered in the principal action, and no supersedeas bond has at any time been given.

Under the statute (Rem. Code, § 1722; P. C. § 7296), had Mrs. Smith desired to supersede the judgment against her, it would have been necessary for her to give a supersedeas bond in approximately the sum of $74,000. The theory of the statute is that, where a money judgment is entered, in order to stay execution upon it it is necessary for the judgment debtor to secure the judgment creditor by a bond in double the amount of the judgment. If, upon appeal in case of a money judgment, there should be an affirmance, the amount of the judgment creditor's recovery would be the amount specified in the judgment. And if he did not recover thereon his loss would be represented by the same amount. In the injunction action now before us, the liquid assets of the corporation are $47,000, and if these should be disputed and placed beyond the reach of the judgment creditor in the principal action, his loss would be that sum. In the mandamus action, the stock being of approximately the value of two hundred dollars per share, and there being liens against it to the extent of approximately twenty thousand dollars, there would remain value in the stock of about thirty thousand dollars. It is thus easy to be seen what might be the measure of the loss to the judgment creditor if adequate bonds should not be given and he should be successful upon appeal. It would seem that there would be the same reason for fixing a bond in double the amount of the liquid assets of the corporation which might be dissipated as there would for fixing, as the statute requires, a bond in double the amount of a money judgment in order that there may be a supersedeas.

Taking the two actions together and considering all the attendant facts and circumstances, together with the amount of loss which may result to the plaintiff in the original action if adequate supersedeas bonds are not required, it cannot be held that the trial court fixed the bonds in an unreasonable amount, and therefore acted in an arbitrary and capricious manner.

In fixing the amount of a bond it is necessary to take into consideration, as already stated, the amount of damages or loss that may be sustained by one whose action is sought to be superseded if an adequate bond is not given and that party should prevail upon an appeal. In *Hillman v. Gordon,* 107 Wash. 249, 181 Pac. 677, there was an application to vacate a judgment of the superior court, from which there had been no appeal. The application was denied and notice of appeal given. Thereupon a petition was made to this court that it cause to be fixed the amount of a supersedeas bond. Reasoning by analogy in that case, the court directed that the supersedeas bond be fixed in the same amount that would have been necessary to supersede the judgment had there been an appeal prosecuted therefrom, stating that the appellants in that action should not be placed in a more advantageous position with reference to the amount of the bond than they then would have had had they appealed directly from the judgment instead of from the order refusing to vacate it.

In the present case, had Mrs. Smith appealed from the judgment, under the statute she would have been required to give bond in the sum of seventy-two thousand dollars, but, as stated in the case cited, she should not be placed in a more advantageous position in attempting to supersede the injunction and the

writs of mandate than she would have been had she superseded the judgment.

The application in each case will be denied.

PARKER, C. J., BRIDGES, MITCHELL, and TOLMAN, JJ., concur.

[No. 16318. Department Two. September 16, 1921.]

POOLE'S SEED & IMPLEMENT COMPANY, *Respondent*, v. J. O. RUDENE, *Appellant*.

J. W. JONES, *Respondent*, v. J. O. RUDENE, *Appellant*.[1]

HIGHWAYS (53, 58)—COLLISION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether the driver of an automobile is guilty of contributory negligence in failing to slacken speed when an automobile behind is attempting to pass at the same time another car is approaching from the opposite direction, is a question for the jury, where it appears that he was going at a slow rate of speed, and expected the other car to pass.

EVIDENCE (64)—REMOTENESS. In a personal injury action, testimony as to an injury to plaintiff's back, though indefinite, is not subject to be stricken on the ground of remoteness.

APPEAL (454) — REVIEW — HARMLESS ERROR — FACTS OTHERWISE ESTABLISHED. In an action for damages for injury to an automobile as the result of a collision, testimony as to the cost of making the repairs, while incompetent, was not prejudicial where there was evidence as to the value of the car before and after the accident and this corresponded substantially to the amount of damage shown by the incompetent evidence.

EVIDENCE (86)—ADMISSION—OFFER OF COMPROMISE—IMPLIED RECOGNITION. An offer to pay the cost of repairs for injuries to an automobile, though not admissible in evidence as an offer of compromise, is admissible as impliedly recognizing the liability of the one making the offer.

HIGHWAYS (52, 59)—COLLISION—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for damages for collision between automobiles, it is proper to instruct that, though defendant may have been guilty of negligence, if plaintiff was aware of it in time so that by ordinary care he could have avoided the effect of such

[1]Reported in 200 Pac. 1104.

negligence and did not do so, plaintiff could not recover; and that in determining whether plaintiff was negligent the jury should take into consideration the circumstances surrounding him at the time and whether he acted as an ordinarily careful person would under the circumstances.

TRIAL (118) — MISCONDUCT OF JURY — SEPARATION. Separation of the jury allowed by the court after argument of counsel and instruction by the court, but before they had retired for deliberation was not error, in view of Rem. Code, § 349.

Appeal from judgments of the superior court for Skagit county, Brawley, J., entered July 30, 1920, upon the verdict of a jury rendered in favor of the plaintiffs, in consolidated actions for personal injuries and damage to property sustained in an automobile collision. Affirmed.

Henry Alberts McLean, for appellant.

Ralph Woods, for respondents.

MAIN, J.—These two actions were consolidated in the trial court and tried as one. The plaintiff Poole's Seed & Implement Company, a corporation, was seeking damages for an injury done an automobile owned by it. The plaintiff J. W. Jones brought his action to recover for personal injuries. Both actions were based upon the charge of negligence on the part of the defendant. In his answer the defendant denied negligence on his part and pleaded affirmatively that the accident which caused the damage to the automobile and injury to Jones was the negligence of Jones himself. The cause was tried to the court and a jury, and resulted in a verdict of $129.37 on account of damages to the automobile, and $1,500 damages for personal injuries.

The defendant made a motion for judgment notwithstanding the verdict and also for new trial, both of which were overruled. Judgment was entered upon the verdicts, and the defendant appeals.

The accident out of which the cases arose occurred on the 27th of June, 1918, on the Pacific highway, between Sumner and Tacoma. The appellant was traveling upon this highway, going west in a five passenger Buick automobile. As he was proceeding, Jones turned into the same highway from a side road some distance in front of the appellant's car, and, after traveling a short distance, stopped to pick up a Japanese boy. Jones was driving a Ford truck. After making the stop, Jones started his car and shifted to a higher gear. He was proceeding on the right-hand side of the paved roadway at a speed of approximately fifteen miles an hour. An Overland car was approaching from the opposite direction. The appellant attempted to pass the Ford truck, and in the act of doing so, the right rear wheel of the Buick car struck the left front wheel of the Ford truck and caused it to leave the roadway, go into a ditch and turn over. The left-hand side of the Buick car barely touched the Overland as it passed. The roadway was not wide enough for the three cars to proceed abreast. The Overland car was traveling at approximately the rate of twenty-five miles per hour, as was also the Buick driven by the appellant. The facts thus stated are those which the jury had a right to find, even though some of them may have been in dispute.

The appellant's first point is that the trial court erred in failing to sustain his motion for judgment notwithstanding the verdict. It is clear from the evidence, and we do not understand it to be contended to the contrary, that the question as to whether the appellant was guilty of negligence under the evidence was one for the jury. If we have gathered the argument correctly, the appellant's position is that Jones was guilty of contributory negligence in failing to

slacken the speed of his Ford truck after he became aware that the Buick was attempting to pass. In support of this position, certain excerpts from Jones' testimony to the effect that he did not slow up because he did not have to, are made prominent. It is necessary, however, to take his testimony as a whole, and when it is read in its entirety it shows that at least the jury had a right to find that the reason he did not slow up was because he was going at a slow rate of speed, and that he did not realize the conditions and he estimated that the appellant would accelerate his speed and get by. Whether it was the duty, under the attendant circumstances, of Jones to slacken his speed was submitted to the jury by appropriate instructions. It cannot be said that he was guilty of contributory negligence, as a matter of law, in failing to reduce the speed of the Ford car. The question was clearly one for the jury.

The second point is that the court erred in refusing to strike the evidence relating to the injury to Jones' back, for the reason that it is too remote. The doctors whom Jones consulted after the accident and prior to the trial were called and testified. In the course of their testimony a reference was made to the injury to the back. While the evidence is somewhat indefinite, yet it was not of that remote nature which made it error for the trial court to refuse to strike it. It was proper to submit the evidence to the jury.

The next point is that the court erred in admitting in evidence the costs of repairing the car as a measure of damages. The secretary of the Poole's Seed & Implement Company testified in answer to a question, and over objection, that the cost of making the repairs was about $125. This evidence was not followed by other evidence showing that such cost was the reasonable

and ordinary value of such repairs. Subsequently another witness was called who, having qualified, testified to the value of the car before the accident and afterwards. This evidence met the requirement of the rule stated in *Alexander v. Barnes Amusement Co.*, 105 Wash. 346, 177 Pac. 786. There was no material difference between the cost of repairs as testified to and the difference in the value of the car before and after the accident. The evidence as to the cost of repairs, even though not made competent by subsequent further proof, was yet not prejudicial to the appellant in view of the other testimony which was to the same effect.

It is next claimed that the court erred in admitting in evidence certain correspondence because such correspondence showed an offer of compromise. The Poole's Seed & Implement Company wrote the appellant that to repair the Ford would cost about $125. To this the appellant replied by stating that the estimate was much higher than he had expected and enclosed a check for the sum of $60 towards the repairs. This check was returned, and further correspondence ensued. The examination of the correspondence shows that impliedly the appellant recognized his liability for the repairs. In addition to this, there was testimony that he stated after the accident that he would pay the cost of the repairs. The correspondence does not show an offer of compromise under the rules stated in *Moore v. Stetson Machine Works*, 110 Wash. 649, 188 Pac. 769, but under the rule of that case the evidence was admissible.

The next point is that the court committed error, not only in the instructions given, but in refusing certain requests. Without reviewing the instructions in detail it may be said that they have been examined

with care, both those given and the requests refused, and there was no error in this respect. The jury were correctly and fully instructed upon the issues and the facts of the case, and so far as the requested instructions correctly state applicable law, they were sufficiently covered by those given. The jury were told that, even though the appellant may have been guilty of negligence, yet if Jones was aware of such negligence in time so that by the use of ordinary care and prudence he could have avoided the effect of such negligence, and he did not do so, then such negligence on Jones' part would prevent a recovery, and further, that, in determining whether Jones was guilty of negligence, the jury should take into consideration the circumstances surrounding him at the time and require him to act as an ordinarily careful and prudent person would under the same circumstances. There was no error in the matter of the instructions.

The last point is that the trial court erred in permitting the jury to separate after they had been instructed and after the completion of the argument of counsel. The argument was completed about six o'clock in the evening on the last day of the trial. The jury were by the court permitted to separate and return the following morning at nine o'clock. The statute (Rem. 1915 Code, § 349; P. C. § 8513), provides:

"After hearing the charge, the jury may either decide in the jury-box or retire for deliberation. If they retire they must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court."

By this statute it will be noted that, after the jury "retire", they must be kept together, as therein provided. In this case the court did not finally submit

the case to the jury until the following morning, and it was then that they retired to consider their verdict, and not on the prior evening.

The judgments will be affirmed.

Parker, C. J., Fullerton, and Tolman, JJ., concur.

[No. 16510. Department Two. September 19, 1921.]

F. M. Black, *Appellant*, v. S. W. Thompson *et al.*, *Respondents.*[1]

Appeal (406) — Review — Discretion—New Trial. The grant of a new trial on the ground of insufficiency of the evidence will not be disturbed on appeal, where the evidence was conflicting and there is nothing in the record to show an abuse of the discretion lodged in the trial court.

Same (476)—Subsequent Appeals—Former Decision as Law of Case—New Trial. The reversal of a case on prior appeal for error in granting motion for dismissal and nonsuit, and remanding the case with direction to pass upon defendants' motion for new trial has no influence on a subsequent appeal from an order granting a new trial.

Appeal from an order of the superior court for Clarke county, Back, J., entered October 6, 1920, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Affirmed.

Crass & Hardin, for appellant.

Miller & Wilkinson, for respondent.

Bridges, J.—By this action the plaintiff sought to recover damages of the defendant because of alleged misrepresentations growing out of a mutual exchange of lands. The verdict of the jury was in favor of the plaintiff. He has appealed from an order granting defendants' motion for a new trial.

[1]Reported in 200 Pac. 1106.

The new trial was granted because of insufficiency of the evidence to justify the verdict, and because of errors occurring at the trial. We have always held that the granting or refusing to grant a new trial is wholly in the discretion of the trial court, and that upon appeal we will not interfere, unless from an examination of the record we are convinced that the trial court has abused its discretion. We have also many times held that, if the trial court believes that the verdict of the jury is not supported by the evidence and that there has been a miscarriage of justice, it is its duty to grant a new trial.

In the case of *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760, we said:

"Courts should take due care not to invade the legitimate province of the jury, but if, after giving full consideration to the testimony in the light of the verdict, the trial judge is still satisfied that the verdict is against the weight of the evidence and that substantial justice has not been done between the parties, it is his duty to set the verdict aside."

In the case of *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907, we said:

"In this case it was within the discretion of the court to grant a new trial on the ground of insufficiency of the evidence to justify the verdict. While it is the duty of the trial court to grant a new trial when it appears to the court that the verdict is manifestly against the weight of the evidence and the justice of the case, the rule is different in appellate courts. On appeal the orders of the trial court in granting or refusing new trials will not be disturbed where the record shows a substantial conflict in the testimony."

See, also, *Ziomko v. Puget Sound Elec. R. Co.*, 112 Wash. 426, 192 Pac. 1009. The foregoing are only a few of the many cases out of this court to the same effect.

The testimony here was conflicting. The trial court in granting the new trial manifested a belief that there had been a miscarriage of justice. There is nothing in the record to show that he abused his discretion.

But the appellant thinks the usual rules are inapplicable here because this case was before this court once before on the same testimony that is here now. *Black v. Thompson,* 110 Wash. 379, 188 Pac. 393. When the verdict was rendered against the defendant below, it moved for a new trial, and the trial court, instead of ruling upon that motion, entered a judgment sustaining the defendant's motion for a nonsuit, made during the trial of the case, and dismissed the action. It was from that disposition of the case that the former appeal was taken. In that appeal we simply decided that the trial court was in error in sustaining the nonsuit and dismissing the case, and we reversed the judgment and returned the case to the trial court with directions to consider and rule upon the motion for a new trial. The court then heard the motion for new trial and granted it, and the appeal now before us is in that matter. The former appeal can have no effect or influence on the question now before us. The question in the first appeal was whether or not the case was properly nonsuited and dismissed. The question before us now is whether the trial court abused its discretion in granting a new trial. Under these circumstances it is manifest that we did not, and could not, under the first appeal, decide or even consider the question now before us. This appeal stands as though the first appeal had never been taken. The judgment is affirmed.

Parker, C. J., Main, Mitchell, and Tolman, JJ., concur.

[No. 16566. *En Banc.* September 22, 1921.]

CALIFORNIA INSURANCE COMPANY, *Respondent*, v. C. B. APLIN, *Appellant*.[1]

REPLEVIN (35)—TITLE AND RIGHT TO POSSESSION—IDENTITY OF PROPERTY—EVIDENCE—SUFFICIENCY. An action of replevin to recover a stolen automobile which had been sold to an innocent purchaser is sustained by proof that the factory and motor numbers on the car were the same as on the car which had been stolen; and by the further testimony of the thief that he had sold the car to the defendant.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered May 13, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action of replevin. Affirmed.

J. W. Brooks, for appellant.

Sharpstein, Smith & Sharpstein, for respondent.

BRIDGES, J.—In 1919, one Mrs. Welch, of Denver, Colorado, purchased in that city a Cole automobile, motor number 29,087, factory number 50,420. It was stolen from her and by the thief driven to Walla Walla, in this state, where he sold it to the appellant for a valuable consideration. Mrs. Welch had the car insured against theft with the plaintiff, who paid her and took from her an instrument conveying to it the title to the car. It brought this action to recover possession of the car from the defendant. The chief question in this action was whether the automobile in appellant's possession was the same as that stolen from Mrs. Welch. There was a verdict in favor of the plaintiff, and the defendant has appealed from judgment entered thereon. Apparently, the chief argument of

[1]Reported in 200 Pac. 1079.

the appellant here is that his motion for nonsuit should have been granted.

The proof is overwhelming that the car involved in this action is the identical car which was stolen from Mrs. Welch; the factory and motor numbers are the same, and there were other things which fully identified it. The person who stole the car in Denver testified to that fact and that, after driving it to Walla Walla, he sold it to appellant. Mrs. Welch testified that the car stolen from her was a Cole Sportster, whereas the car involved here is known as a Cole Tourister, but the two models are very similar, and the discrepancy in this regard may be considered wholly immaterial.

The appellant complains because the court did not give certain instructions requested by him. A reading of the instructions, however, shows that the court did give such requested instructions.

There is some complaint made about the instructions given, other than those requested, but the appellant does not point out wherein they are defective. A reading of them shows them to have been entirely proper.

The case was carefully tried by the court, and we find no errors. The judgment is affirmed.

Mackintosh, Main, Mitchell, Holcomb, and Tolman, JJ., concur.

[No. 16432. Department Two. September 22, 1921.]

ALFRED E. SHAW, *Appellant*, v. ROGERS & ROGERS, *Respondent*.[1]

LIMITATION OF ACTIONS (17-1)—APPLICABLE TO PARTICULAR ACTIONS—BREACH OF IMPLIED CONTRACT. The cause of action against an insurance agent for failure to write insurance for an applicant in a solvent company arises at the time of writing the insurance, and not at the time damages accrue from a fire loss; hence the action is barred under Rem. Code, § 159, if not instituted within three years after placing the insurance in an insolvent company.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 19, 1921, in favor of the defendant, dismissing an action for damages, upon sustaining an objection to the introduction of testimony. Affirmed.

F. A. McMaster, for appellant.

E. Eugene Davis and *Hurn & Hurn*, for respondent.

MAIN, J.—Plaintiff brought this action for damages sustained because the defendant company had failed to write fire insurance in a solvent company. The defendant, in its answer, pleaded affirmatively the statute of limitations. The cause came on for trial before the court and a jury, and after the first witness had been sworn, the defendant objected to the introduction of any testimony because, under the admitted facts, the action was barred by the statute of limitations. This objection was sustained, and a judgment entered dismissing the action. The plaintiff appeals.

The facts necessary to present the question for determination may be stated as follows: The respondent, Rogers & Rogers, a corporation, in the year 1915, was engaged in the insurance business in Spokane.

[1]Reported in 200 Pac. 1090.

On August 26 of that year, the appellant applied to it for insurance covering his hotel building at St. Maries, Idaho. The selection of the company in which to write the insurance was left to the respondent. Among the policies written was one for $750, in the Anglo-American Fire Insurance Company of Toronto, Canada. On February 5, 1916, the hotel building was totally destroyed by fire, and on February 22 of the same year, the insurance company mentioned was placed in the hands of a receiver at Toronto, Canada. The Anglo-American Fire Insurance Company was not licensed to write insurance in either the state of Washington or the state of Idaho, and the respondent was not its legal agent in either state, which fact was not known to the appellant. This action was commenced on the fourth day of January, 1919, and, as above stated, the appellant is seeking to recover damages because of the failure of the respondent corporation to write the insurance above mentioned in a solvent company.

The controlling question is whether the action was begun within the time limited by law. This is not an action for fraud and deceit, but an action for the breach of duty on the part of the insurance agent in failing to write the insurance in a solvent company. Under § 159 of Rem. Code (P. C. § 8166), it was necessary that the action be begun within three years from the time it arose. From the facts stated, if the cause of action arose immediately upon the failure of the respondent to write the insurance in a solvent company, the action is barred by the statute, as more than three years had lapsed between that time and the time when the action was begun. In *Cornell v. Edson*, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279, it was held that the action for damages against an attorney for wrongfully dismissing an action and concealing the fact was not an action for relief on the ground of

fraud but one for breach of duty, and accrued when the act occurred. It was there said:

"The action is plainly one based upon a breach of duty growing out of the relation existing between the parties, a contractual relation which calls for a full disclosure; and when, by reason of the failure to make a full and complete disclosure, or the withholding or concealment of facts which should have been disclosed, loss is suffered, there is a breach of duty, and for such breach an action will lie. But like any other action founded upon a breach of duty imposed either by law or contract, the action arises out of the breach, and the statute of limitations begins to run from the time of the breach and not from the time of its discovery." (page 664.)

Applying the doctrine of that case to the facts in the present case, the breach of duty occurred when the respondent corporation failed to write the insurance in a solvent company, and not when the damages arising from the fire accrued. It is true that the amount of damages which could have been recovered had the action been brought immediately upon the breach of the duty, and the amount which was susceptible of the recovery after the fire were different, but it is not material that all the damages resulting from the act should not have been sustained at the time the breach of duty occurred, and the running of the statute is not postponed by the fact that actual or substantial damages do not occur until a later date. In 17 R. C. L. 764, the rule is stated in the following language:

"It is not material that all the damages resulting from the act should have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. The act itself is regarded as the ground of the action and is not legally severable from its consequences. The statute then

begins to run, and not from the time of the damages or discovery of the injury. And it is immaterial whether the conduct out of which the cause of action arises is the breach of an implied contract or the affirmative disregard of some positive duty. In either case, the liability arises immediately on the breach or disregard of duty, and an action to recover the damages, which are the measure of such liability, may be immediately maintained. . ."

The action not having been begun within the time limited by law, the holding of the trial court was correct and the judgment will be affirmed.

PARKER, C. J., MITCHELL, FULLERTON, and TOLMAN, JJ., concur.

[No. 16284. Department Two. September 22, 1921.]

MARY A. GREGG, *Respondent*, v. J. EDWARD GREGG, *Appellant*.[1]

APPEAL (389)—REVIEW—AMENDMENTS REGARDED AS MADE. Under Rem. Code, § 1752, requiring the appellate court to dispose of all causes upon the merits, disregarding technicalities, and considering all amendments which could have been made as made, it will be presumed, in the absence of a statement of facts or bill of exceptions, that the evidence supports the findings and decree, and that the complaint was amended to comply with the evidence.

SAME (145) — REVIEW — EXCEPTIONS TO FINDINGS — NECESSITY. Where no exceptions were taken to findings of fact or conclusions of law, their insufficiency cannot be raised on appeal.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered May 27, 1920, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

W. C. Donovan, for appellant.

Turner, Nuzum & Nuzum and *Richard B. Harris*, for respondent.

[1]Reported in 200 Pac. 1084.

MITCHELL, J.—This is an appeal from a decree of divorce which provides also for the custody of a child of the parties and makes provision for support money for the child. The husband, the defendant, has appealed.

A motion made on the appeal by the respondent, on being confessed by the appellant, eliminates from the record all matters relating to the merits other than the pleadings, findings of fact, conclusions of law and decree. No exception was taken to any finding or conclusion made by the trial court.

It is contended the trial court erred in overruling a general demurrer to the complaint. We think, however, the complaint is sufficient as against a general demurrer. That attack on the complaint, however, is not important or controlling at this time under § 1752, Rem. Code (P. C. § 7336), which provides that on appeal this court shall dispose of all causes upon the merits thereof, disregarding technicalities, and to consider all amendments which could have been made as made; and furthermore, under the cases of *Holden v. Romano,* 61 Wash. 458, 112 Pac. 489, and *McCreery v. Carter,* 73 Wash. 394, 131 Pac. 1125, we must presume, in the absence of a statement of facts or bill of exceptions, that the evidence supports the findings and decree and must consider the complaint amended if need be.

The other assignments are that the court "erred in its findings of fact, conclusions of law and decree", and "that the evidence fails to sustain the findings of fact, conclusions of law and decree." It has just been noticed that we must presume to the contrary, and besides no exceptions were taken to the findings and conclusions.

The findings of fact and conclusions made and en-

tered by the trial court amply support and call for the decree that was made. Affirmed.

PARKER, C. J., MAIN, HOLCOMB, and TOLMAN, JJ., concur.

[No. 16433. Department Two. September 22, 1921.]

JESSIE LOUGHNAN, *as Administratrix etc., Appellant,* v. WALKER D. HINES, *as Director General of Railroads, et al., Respondents.*[1]

RAILROADS (66)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—FAILURE TO CONTROL SPEED OF TRUCK. A truck driver, killed as the result of a collision with a passenger train on a country road crossing, was guilty of contributory negligence barring recovery for his death, where the evidence showed his familiarity with the crossing, its surroundings and attendant dangers; that there was a zone of safety before reaching the track of thirty to thirty-five feet, within which he could have seen the approaching train free of all obstruction to his view, and within which he could have stopped his truck; that he failed to heed a warning given by a section foreman, but continued his course without effort to control the speed of the truck until he had passed onto the crossing, when it was too late to do other than try to speed it up in an effort to save himself.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered June 26, 1920, upon granting a nonsuit, dismissing an action for wrongful death. Affirmed.

C. D. Cunningham and *Troy & Sturdevant,* for appellant.

Geo. W. Korte and *Frank C. Owings,* for respondents.

PARKER, C. J.—The plaintiff, Mrs. Loughnan, as administratrix of the estate of her deceased husband, Hulton Loughnan, commenced this action in the su-

[1]Reported in 200 Pac. 1086.

perior court, seeking recovery of damages for his death, alleged to have been caused by the negligent operation of a passenger train of the Chicago, Milwaukee & St. Paul Railway Company over the highway crossing at the flag station of Beaver creek, in Thurston county, while the operation of the lines of that railway company was in the hands of the defendant Hines as United States Director General of Railroads. A trial upon the merits—the court sitting with a jury—proceeded to the conclusion of the evidence introduced in behalf of the plaintiff, when counsel for the defendants moved the court to withdraw the case from the consideration of the jury and render judgment denying any relief to the plaintiff; upon the ground that the evidence then called for the conclusion, as a matter of law, that the plaintiff's deceased husband met his death as the result of his own negligence and want of care. This motion was granted, and a judgment rendered accordingly, from which the plaintiff has appealed to this court.

The so-called flag station of Beaver creek consists only of the intersection of a county highway, running north and south, with the main line of the Tacoma & Grays Harbor Division of the Chicago, Milwaukee & St. Paul Railway, running east and west; a spur track on the south side of the main line connecting therewith about five hundred feet east of the intersection; a lumber loading platform adjoining and on the south side of the spur track; and a small building or shelter adjoining and upon the north of the main-line track. Regular trains stop at this flag station only on signal, and there does not appear to be any occasion for or custom of the regular trains diminishing their speed when passing over this crossing, except when stopping for passengers or freight. Indeed, the crossing seems to be treated as any other country road crossing in so

far as the speed of trains passing over it is concerned. It is, however, a crossing much used by vehicles.

At the time the deceased lost his life, he had been employed for a month or more by a lumber company as a logging truck driver to haul logs over this country road and crossing from the woods north of the railway track to the company's sawmill, a short distance south of the railway track. He had, for a month or more previous, made an approximate average of five trips a day, driving the truck over the crossing approximately ten times a day; so, of course, he was well acquainted with the crossing, its surroundings and attendant dangers. The road approaches the railway track from the south on a slight up-grade. On the road, at a distance of eighty-five feet to the south of the crossing, one riding in an automobile, or truck such as the deceased was driving, can for a short space see a train on the railway to the east a distance of approximately six hundred and fifty feet from the crossing; but at the time in question, by reason of obstructions towards the east—particularly lumber on the platform and a freight car on the spur track—such traveler could not again see east along the track for any considerable distance until he would arrive at thirty feet south of the crossing, when he would have an unobstructed view of the track to the east for a distance of two hundred and thirty-two feet, looking past the north side of the freight car then on the spur; which view to the east would be proportionately extended as he continued to approach the crossing, there being no further obstruction to his view while passing over this thirty feet of the road. The railway track runs straight east for a long distance.

At the time in question, deceased approached the railway track from the south, driving the truck on his way to the woods for a load of logs for the mill. It

was a gasoline motor-driven truck of large size. He drove towards the crossing at an approximate uniform speed of ten miles per hour, without materially changing his speed until the front of the truck was almost upon the track, when, seeing a passenger train close upon him, approaching from the east at a high rate of speed, he suddenly increased the speed of the truck, apparently in an effort to pass over the track and escape injury; probably concluding that such was then his only possible chance of escape. The cab of the truck in which the deceased was sitting and driving came immediately upon the track just as the engine of the train came into collision with that part of the truck, resulting in his almost instant death. At the time in question, some section men had their hand-car off the main track, near the north side thereof, about fifty feet east of the crossing, in plain view of the deceased. They evidently were waiting for the passing of the train, it being the regular scheduled time therefor. Their foreman was there with them. At the same time, a witness, Taylor, was working on the loading platform to the south of the spur track. He was at least a hundred feet east and south of where the section foreman was with his men, and saw the train approaching, at the same time being aware of the approach of the deceased towards the crossing. Referring to the action of the section foreman immediately prior to the accident, Taylor testified as follows:

"Q. . . . What happened there with reference to the section man? A. I got up and hollered at the section man to flag the truck driver. Q. When was that you did it? A. Just before the accident and it was when the truck must have been within thirty or thirty-five feet from the rail and he got up and [said] 'Hey, you better stop there' and that is all that he said.

He stuck up one hand and said 'you better stop there.' Q. You heard him say those words from where you were on the platform? A. Yes. . . . Q. Where was the hand-car, if they had a hand-car? A. It was sitting back about fifty feet there from the crossing, right opposite the track. Q. What was the section foreman doing before you called to him? A. He was sitting on the hand-car or whatever it was. It was either a hand-car or a few ties. I am pretty sure it was a hand-car."

Another witness, who was on the platform with Taylor, heard him call to the section foreman, and also saw and heard the section foreman warn the deceased as he was approaching the crossing. Referring to the action of the deceased immediately prior to the accident, Taylor also testified as follows:

"Q. What did the truck driver do at that time? A. It looked as though he gave a slight glance up the track and kind of raised up in his seat. Q. Now at the time the truck driver gave the short glance up the track, where, approximately as near as you can tell, was the head of the locomotive? A. Well it was practically onto him. It was within a very few feet you might say."

This is in substance the whole of the evidence touching the question of what the deceased did in the way of looking for an approaching train as he approached the track. The foregoing facts are, of course, summarized from the evidence introduced in appellant's behalf, and we think it is as favorable a summary of the facts supporting her counsel's contentions as can be made from the evidence.

The principal ground of alleged negligence on the part of the operators of the train is failure to timely sound the whistle and ring the bell on approaching the crossing. We may concede, for present purposes, that the evidence tending to show negligent operation of the train was sufficient to carry that question

to the jury. The question of contributory negligence of the deceased being a proximate cause of his death, we think, however, must be decided against appellant as a matter of law, as it was decided by the trial judge, following our decision in *Benedict v. Hines,* 110 Wash. 338, 188 Pac. 512; in view of the deceased's knowledge of and familiarity with the crossing, its surroundings and attendant dangers; his having a zone of safety, before reaching the track, of thirty to thirty-five feet, within which he could have stopped his truck, in any event, by having it under proper control; his manifest lack of effort to properly control the speed of the truck until he had passed entirely over this zone of safety to the crossing, when it was too late to do other than try to speed it up and save himself; his manifest lack of effort to inform himself of the possible approach of a train until it was too late; his manifest want of care in failing to heed not only the inherent dangers of the crossing, but also the warning of the section foreman, given so plainly and under such circumstances that he must have noticed that warning, had he been exercising any sort of care such as the very nature of the location called for.

Counsel for appellant invoke our language used in *Smith v. Inland Empire R. Co.,* 114 Wash. 441, 195 Pac. 236, as follows:

"Since no one saw the deceased at the time he approached the crossing, and since there was no evidence to show what he did at or before he attempted to cross the railway track, it must be presumed that he used due care. If his engine was running, making a noise, as it no doubt was, and if he approached the crossing and stopped, looked and listened before attempting to make the crossing and did not hear the crossing bell or the approach of the train and did not see it until it was too late to avoid the accident, he was clearly not guilty of contributory negligence."

That, however, is not our present case. Here we have appellant's own evidence telling us that the deceased approached and drove clear up to the track without materially slackening his speed; that he had a clear zone of safety of thirty feet before reaching the track, within which, by exercising due care, he could have saved himself; and that he must have seen or heard the warning of the section foreman, had he been exercising due care. We think, in such a situation, the presumption cannot be indulged in that the deceased used due care in the way of looking, listening, or otherwise informing himself of the possible approach of the train. In our opinion in the *Smith* case, Judge Mount, speaking for the court, said:

"We are of the opinion that case [the *Benedict* case] is readily distinguishable from this by reason of the fact that there, while Mr. Benedict was crossing the track, witnesses who saw him testified that, as he approached the crossing, he was driving at a speed of eight or ten miles per hour; that he never slackened his speed but kept right on, and after crossing through the line of box cars, drove immediately in front of the train without looking or taking any precaution for his safety. There was, therefore, no presumption in that case that he exercised due care, because the evidence there very clearly showed that he exercised no care whatever."

Some other claims of error are presented to us, but they have only to do with rulings touching the admissibility of evidence relating to the negligent operation of the train, and however viewed by us would not affect our conclusion upon the question of the deceased's contributory negligence.

We see no escape from the conclusion that there can be no recovery for this unfortunate occurrence. The judgment of the trial court must be affirmed. It is so ordered.

MAIN, MITCHELL, BRIDGES, and TOLMAN, JJ., concur.

[No. 16452. Department Two. September 22, 1921.]

B. C. PHILLIPS, *Respondent*, v. J. C. VERBEKE, *Defendant*, G. L. SMITH *et al.*, *Appellants*.[1]

FRAUDULENT CONVEYANCES (14)—SALE OF GOODS IN BULK—WHO ARE CREDITORS—STATUTES—CONSTRUCTION. The bulk sales law requiring an affidavit as to creditors on the sale of a stock of goods applies alike as to all creditors of the vendor, irrespective of whether the transaction between the parties was separate from and without regard to the business carried on by the vendor.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered September 13, 1920, upon findings in favor of the plaintiff, in garnishment proceedings, tried to the court. Affirmed.

W. C. Donovan, for appellants.

Clyde H. Belknap, for respondent.

TOLMAN, J.—In January, 1920, respondent brought suit against the defendant, J. C. Verbeke, upon a cause of action alleged to have arisen on December 2, 1919. He subsequently recovered judgment in the full amount demanded, and a portion was thereafter collected, but the judgment remained unpaid, unsatisfied and in full force for upwards of $200. In March, 1920, the defendant, Verbeke, sold to appellants a grocery store, comprising the stock of merchandise and fixtures, and thereafter, in a further effort to collect the judgment, respondent caused a writ of garnishment to issue directed to appellants. In due time appellants answered the writ, denying that they, or either of them, were indebted to the principal defendant, or that they had in their possession or under their control any property belonging to him. The respondent contested the answer of the garnishees, alleging that

[1]Reported in 200 Pac. 1091.

the defendant, Verbeke, had been engaged in the retail grocery business and became and was indebted to respondent in the sum of $300; that while the action to recover that amount was pending in the superior court, Verbeke sold and delivered his stock of merchandise in bulk to the garnishee defendants, without complying with the terms of the bulk sales law, or making an affidavit as to creditors which the statute requires, and that Verbeke's creditors were not paid out of the purchase money or at all; alleging that the sale to the garnishee defendants was therefore fraudulent and void, and that the value of the merchandise so transferred was approximately $1,500. A demurrer to this reply was overruled, and upon a trial the lower court found for the respondent in accordance with the allegations of his reply, and entered judgment against the garnishee defendants in the sum of $219.78, with interest and costs, from which they appeal.

Appellants contend for a construction of the statute relating to sales of merchandise in bulk which will limit its effect to those creditors holding claims arising on account of goods, wares and merchandise purchased upon credit, or money borrowed to carry on the business; arguing that it could not have been the intention of the legislature to protect those creditors of the vendor who had dealt with him individually, separate and apart from and without regard to his business. Appellants concede that we have held otherwise in *Eklund v. Hopkins,* 36 Wash. 179, 78 Pac. 787, there laying down the rule squarely that the statute in question applies alike to all of the creditors of the vendor, without distinction, and now invites us to overrule that case.

The *Eklund* case was decided December 13, 1904, and the legislature has met many times since without by

amendment changing the statute to avoid the effect of that decision, and the inference may be drawn therefrom that the legislative intent is correctly interpreted by that case. We have recently reaffirmed and approved the doctrine of the *Eklund* case in *Gregg v. Reisinger*, 110 Wash. 680, 188 Pac. 765, and being still of the opinion that it announces the correct rule, the judgment here appealed from is affirmed.

PARKER, C. J., HOLCOMB, MAIN, and MITCHELL, JJ., concur.

[No. 16403. Department Two. September 26, 1921.]

WILLIAM PETRY, *Appellant*, v. WALKER D. HINES *et al.*, *Respondents*.[1]

RAILROADS (64, 71)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether one driving an automobile towards a country railway crossing at from eight to ten miles an hour could have seen or heard a rapidly approaching passenger train coming through a cut close to the crossing, presents a question for the jury, where there was testimony that no whistle was sounded or bell rung nor any noise of the train noticeable, and that plaintiff kept a sharp lookout from the time he was within fifty feet of the crossing, but did not see the train until within about ten feet of the track, when it was too late to stop his car short of the nearest rail of the track.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered August 27, 1920, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for damages to an automobile struck by a train. Reversed.

C. D. Cunningham and *P. M. Troy*, for appellant.

Geo. W. Korte and *Frank C. Owings*, for respondents.

[1]Reported in 200 Pac. 1077.

Bridges, J.—By this action the plaintiff sought to recover for damages to his Ford automobile, which damages were the result of the automobile being struck by one of defendant's trains at a crossing of the railroad tracks by the county road. The trial court denied both defendant's motion for nonsuit and for a directed verdict. There was a verdict in favor of the plaintiff in the sum of $400. The trial court sustained the defendant's motion for judgment notwithstanding the verdict, because it was of the belief that the plaintiff had been guilty of contributory negligence, and entered a judgment of dismissal, from which the plaintiff has appealed. Practically the sole question argued here is whether the court should say, as a matter of law, that the plaintiff was guilty of contributory negligence. To decide this question the facts must be looked on in the light most favorable for plaintiff.

On the 29th of June, 1919, the appellant was driving his Ford automobile easterly along the public roads from Centralia to Little Rock. At one point the highway crosses at grade the railroad tracks of the Chicago, Milwaukee & St. Paul Railway, which railroad, at the time of the injury, was being operated by the respondent Hines. To the west of the crossing it runs for some distance south of, and parallel to, the railroad. It then makes a sharp turn to the north in order to cross the railroad tracks. This turn is some fifty feet from the tracks. The railroad, immediately to the east of the crossing, is in a slight cut. About four hundred feet east of the crossing the track makes a curve. The right of way on the south side of the railroad tracks, where they come up to the crossing, is covered with shrubs and small trees.

It was between four and five o'clock in the afternoon that the appellant approached the crossing. As he made the turn, some fifty or sixty feet away from

the crossing, both he and another man, who was riding with him in the front seat, began and continued to look and listen for the approach of trains. When the appellant was within about ten feet of the nearest rail, he first saw the train approaching from the east, at a rate of speed estimated by him, as well as his companion, to be some forty-five to fifty miles an hour. He had been approaching the crossing with his automobile at the rate of about eight or ten miles an hour, and as soon as he saw the train, he realized his danger and stopped his car as soon as he could. He succeeded in stopping it before the front wheels had gone over the nearest rail. At that time the engine of the train was about one hundred and fifty feet from the crossing. He did not have time to either cross ahead of the train or to back out of its way. The steps of the engine hit the front part of his car, turned it around, and some other portion of the front part of the train then hit the rear of the automobile and very badly damaged it. The appellant testified that he neither heard nor saw the train at any time before reaching a point about ten feet from the track, although he was constantly looking and listening for it, and that the train did not blow any whistle, ring any bell, or give other warning of its approach. He further testified that, after the accident, he viewed the premises and learned that one sitting in an automobile would not be able to see the approach of the train from the east until he was within approximately ten feet of the track, but that at a point about thirty feet from the track, and at another point about twelve or fourteen feet from the track, it was possible to see the top of the train by looking through the brush and shrubbery on the right of way.

The testimony of respondent's civil engineer, who later examined the premises, was not very materially

different from that of the appellant, in so far as the local surroundings were concerned. He testified that one standing between the rails at the crossing could see the approach of the train about four hundred feet to the east; beyond that it could not be seen because of a curve in the track and certain obstructions. He further testified that, at a point thirteen feet from the center of the crossing, there was an unobstructed view of an approaching train two hundred ninety-two feet down the track to the east of the crossing, and that at a point twenty feet from the center of the crossing, one standing in the highway could see about one foot of the top of a twelve-foot level, located between the tracks two hundred twenty-two feet east of the crossing, and that at a point thirty feet from the center of the crossing, a similar view of the level could be obtained when it was located two hundred feet east of the crossing, and that at a point in the highway about fifty feet from the center of the crossing, a similar view of the level could be had, located at a point one hundred eighty feet to the east of the crossing.

Under this testimony, we think the court was in error in sustaining respondent's motion for judgment notwithstanding the verdict.

The rule is that the driver of an automobile, approaching a crossing such as the one here, must make a reasonable use of his senses to guard his own safety, and failure so to do is negligence.

If the testimony of the appellant is to be believed, he was approaching this crossing at about ten miles an hour. He was constantly keeping a sharp lookout for the approach of trains from the time he was within fifty feet or more of the crossing. His hearing and his eyesight were good. Notwithstanding the fact that he kept a constant watch for any approaching train, he did not see it or hear it in time to stop before reach-

ing the track. There is nothing, either in the appellant's testimony or in the physical facts which would show that the appellant, had he been in the exercise of ordinary care, should and would have seen or heard the approach of the train in time to avoid the accident. It is true he says that, at a point some thirty feet away from the crossing, he might possibly have seen the top of the train, had it at that time been at the point on the tracks where he could have seen it; but inasmuch as the train was going some four or five times as fast as he was, it is not at all improbable that, when he looked for the train at the point thirty feet from the crossing, it was too far down the track to be within his view. But we cannot say he was guilty of negligence in failing to see that which it was possible for him to see. That is within the province of the jury. It is also true that the appellant's car must have been making some noise and interfered somewhat with his hearing the rumble of the train. But that circumstance will not permit us to hold, as a matter of law, that he should have stopped and listened. Unquestionably there are circumstances and conditions which would require a person, exercising ordinary care, to stop his automobile for the purpose of listening for approaching trains, but ordinarily, whether one must so do is a question for the jury and not for the court. *Stewart v. Northern Pac. R. Co.*, 96 Wash. 486, 165 Pac. 377; *Kent v. Walla Walla Valley R. Co.*, 108 Wash. 251, 183 Pac. 87.

We think the conclusion to which we have come is well within many of our previous decisions, of which the following are part: *McKinney v. Port Townsend etc. R. Co.*, 91 Wash. 387, 158 Pac. 107; *Smith v. Inland Empire R. Co.*, 114 Wash. 441, 195 Pac. 236; *Hubenthal v. Spokane & Inland Empire R. Co.*, 97 Wash. 581, 166 Pac. 797.

Respondent contends that, if our position here seems to be supported by some of our cases, it is directly opposed by two of our more recent decisions. It particularly calls attention to the cases of *Mouso v. Bellingham & Northern R. Co.*, 106 Wash. 299, 179 Pac. 848; *Benedict v. Hines*, 110 Wash. 338, 188 Pac. 512. We do not think either of those cases is a departure from our previous holdings, nor is either of them in opposition to the view we here take.

The *Mouso* case was a railroad crossing accident. The facts were that the driver of a motor truck was intending to back his truck over the railroad tracks. When twenty-five feet from the nearest rail, the driver could see without any obstruction along the track whence the train was coming, a distance of nearly eighty feet, and when he was twenty feet from the nearest rail, he had an unobstructed view of the track for a distance of nearly one hundred feet, and when he was fifteen feet away, he had an unobstructed view up the track of more than one hundred sixty feet. The truck was moving very slowly and could be stopped within a very few feet. The driver of the truck testified that he kept looking at the track as he was backing but did not, and was unable, to see the approaching train because of some obstructions. Under these facts, after stating the usual rule with reference to the duties of the driver of the truck, we said:

"Did the driver of the truck perform this duty? He says he did. But his testimony in this respect is denied and overcome by the physical facts. The uncontradicted testimony of the civil engineer, and the map which he prepared, show beyond cavil that, had the driver looked when he was a distance of twenty-five feet from the track, he could have seen the approaching train, which must have then been within the seventy-seven feet of clear view, and would then have had ample space within which to make the stop, which actually required six or eight feet. The physical facts

show that the driver could not have looked until he was approximately fifteen feet from the track and the rear of his truck within a foot or two of the first rail . . .'' *Mouso v. Bellingham & Northern R. Co.*, 106 Wash. 299, 179 Pac. 848.

There are no physical facts in this case which show conclusively that the appellant had an unobstructed view of the track, or that he must, had he looked, have seen the approaching train before he actually did see it. The very most that can be said of appellant's testimony in this regard is that he might have seen the top of the train at a point some distance farther away from the crossing than he actually saw it. But there is no showing that, had the appellant used ordinary care in watching for the train, he must have seen its approach in time to have avoided the collision. What was said by Judge Mount, writing the opinion in the case of *Smith v. Inland Empire R. Co., supra,* is pertinent here:

"But it is said by the appellant that, if Mr. Smith had looked at certain places within one hundred and seventy-five feet or less from the crossing, he must have seen the train. It is no doubt possible that if he had looked at certain places he might have seen the train. The train, as we have said, was coasting down a two per cent grade in a cut. Mr. Smith was approaching the crossing, also in a cut. At best, he could have seen but a small portion of the tops of the cars. If he had stopped at certain points before attempting to make the crossing, the railway train may have been some distance away. He may not have seen it though he had looked carefully. He may have stopped his automobile, loaded as it was, at a point where the train would have been obscured by the rocks and bushes outside of the right of way."

The facts of the *Benedict* case, *supra,* are quite similar to those of the *Mouso* case. There the plaintiff had an unobstructed view of the train in plenty of time to

have avoided the collision. The plain and unobstructed views which were open to the plaintiffs in each the *Mouso* and the *Benedict* cases are important distinguishing features from the case at bar.

The judgment is reversed, and the cause remanded to the lower court to pass upon respondent's motion for new trial, if one were made, and if not, to enter judgment upon the verdict.

MITCHELL, TOLMAN, and MAIN, JJ., concur.

[No. 16456. Department One. September 26, 1921.]

In the Matter of the Estate of ORVIL H. EMMANS.[1]

MARRIAGE (14)—PROOF OF MARRIAGE—EVIDENCE—SUFFICIENCY. Marriage of parties is sufficiently proved by the testimony of the surviving wife that they were married during a trip to Canada, although she could not produce the marriage certificate or remember the town where, or the clergyman by whom, they were married, where a number of witnesses testified to having seen the certificate, and there was evidence that the parties publicly held themselves out as man and wife until the death of the husband some ten years later (MACKINTOSH and HOLCOMB, JJ., dissenting).

APPEAL (452)—REVIEW—HARMLESS ERROR—ERRORS NOT AFFECTING TRIAL DE NOVO. Where a cause is triable de novo on appeal, error of the court in imposing the burden of proof on one of the parties is immaterial.

Appeal from a judgment of the superior court for Spokane county, Oswald J., entered September 21, 1920, upon findings in favor of an administratrix, in an action to vacate the appointment, tried to the court. Affirmed.

Patrick C. Shine, for appellants.

John Pattison, for respondent.

[1]Reported in 200 Pac. 1117.

BRIDGES, J.—On the 17th day of June, 1920, Orvil H. Emmans died intestate and a resident of the state of Washington. Shortly thereafter, Frances Eva Emmans, claiming to be his widow, petitioned the superior court of Spokane county for letters of administration of the estate, and the court, *ex parte*, appointed her and she duly qualified. She sought and obtained her appointment under §§ 61 and 63 of the 1917 Probate Code (Laws of 1917, pp. 656-7). The first mentioned section provides that the surviving husband or wife shall first be entitled to administer, and the second section mentioned provides that, if the petition for appointment be by such survivor, no notice of the hearing thereof need be given. After the appointment of Mrs. Emmans, two of the sisters of the deceased petitioned for the appointment of one of them as administratrix, and sought to vacate and set aside the previous appointment of Mrs. Emmans, on the ground that she was not the surviving widow of the deceased. Pleadings were made up on these issues, and the sole question tried by the court was whether Mrs. Emmans was the surviving widow of the deceased. After an extensive trial, the court found that the deceased and Mrs. Emmans intermarried July 24, 1910, and remained husband and wife until the death of Mr. Emmans, and refused to revoke the letters of administration theretofore issued to her. The other petitioners, to wit, the sisters of the deceased, have appealed.

The following facts are either undisputed or overwhelmingly proved: That Mr. Emmans and Mrs. Frances Eva Hubbell (who now claims to be Mrs. Emmans), on and before the year 1907, lived in the same town in Spokane county; that, during that year, both the husband of Mrs. Hubbell and the wife of Mr. Emmans died; that shortly thereafter Mr. Emmans commenced to board and room at the home of Mrs. Hubbell, and for

some years thereafter assisted her in her business affairs; that in July, 1910, Mr. Emmans and Mrs. Hubbell took a trip to Canada, and were gone for two months or more; that, when they left home for that trip, they were not married; that, when they returned from the trip, they announced their marriage during their absence, and thenceforth, until the death of Mr. Emmans, in 1920, lived together as husband and wife, and were so recognized by the community at large.

The only direct testimony concerning the marriage was that of Mrs. Emmans, formerly Mrs. Hubbell. The appellants made her their witness, and she testified that she and Mr. Emmans left their home together with the view of going into Canada and being married there; that they did go into Canada and at some town, the name of which she does not remember, they left their team and took a train for some other town in Canada, the name of which she does not remember, and after leaving the train they took a stage for another town in Canada, the name of which she does not remember, and in the last mentioned town they were married by a minister of the Gospel, at his home, the name of which minister she does not remember; that the usual ceremony of marriage there took place on the 24th day of July, 1910, and that thereafter, and for the period of ten years, and until the death of Mr. Emmans, they lived together as man and wife. She further testified that, prior to the date of the marriage, they had not cohabited, nor in any manner lived together as man and wife. The testimony further shows that Mr. Emmans, while away on the trip to Canada, wrote several postcards to friends in the state of Washington, wherein he stated, either directly or by close inference, that he had, during that trip, married Mrs. Hubbell. There was also testimony that Mrs. Emmans had told some of Mr. Emmans' sisters that

they were married in the city of Davenport, Washington, which place was reasonably close to their home. This she admitted. She denied, however, that the marriage took place there, and explained that she had said it took place there because her husband had requested her so to do. It appears from the testimony that Mr. Emmans' sisters had complained about his living at the home of Mrs. Hubbell, and had advised him that he should either marry her or cease to live in the house with her.

The appellants lay much stress upon the fact that Mrs. Emmans did not know the town in which she was married, or any town through which she passed, or the name of the minister who married her, and was unable to present any certificate of marriage. It is argued that such a condition of facts is unnatural and destroys the weight of her testimony, and that she so testified for the purpose of making it impossible to directly contradict her testimony concerning her marriage. But she testified that she had never before been in Canada, and that on the trip they were only in small towns and that she did not pay much attention to them and did not remember their names. In any event, such rather unusual testimony cannot have the effect of overcoming her direct testimony that she was married in Canada, when that testimony is supported by all the other practically undisputed evidence to the effect that they lived together as husband and wife for ten years and until his death, and that he, during all of that period, introduced her and recognized her in every way as his lawful wife; that he helped maintain and educate her children by her former marriage; that she joined with him as his wife in the execution of deeds and other papers; that a number of people saw the certificate of marriage, and that for ten years the public of the community where they lived looked on

them and treated them as husband and wife. Even if the testimony of Mrs. Emmans be eliminated from the record, there is left amply sufficient, when put against all the proofs of the appellants, to prove the marriage. Openly living the life of marriage is too strong proof of that relationship to be overcome by lapses of memory or inconsistent testimony concerning the performance of the marriage ceremony. It does not appear in the record that appellants, at any time prior to the death of Mr. Emmans, questioned the marriage of Mrs. Emmans. Not until after his death did they, openly at least, do this.

Much stress is laid upon the fact that Mrs. Emmans was unable to produce her certificate of marriage, but this inability seems to be satisfactorily explained. She testified she and her husband had a certificate of marriage, and that they had shown it to various people, and that thereafter the certificate was mislaid and lost. A number of witnesses testified to having seen the certificate.

In the case of *Summerville v. Summerville,* 31 Wash. 411, 72 Pac. 84, we said:

"A valid marriage may be presumed to exist from general reputation among the acquaintances of the parties that such is the fact, when that reputation is accompanied by their cohabitation, and arises from their holding themselves out to the world as occupying that relation to which the law refers when marriage is mentioned."

To the same effect see *Potter v. Potter,* 45 Wash. 401, 88 Pac. 625; *Weatherall v. Weatherall,* 56 Wash. 344, 105 Pac. 822; *Nelson v. Carlson,* 48 Wash. 651, 94 Pac. 477.

We think the proof is amply sufficient to show that the respondent was the surviving widow of Orvil H. Emmans, deceased.

Some contention is made in appellants' brief that the court wrongfully imposed upon them the burden of proof. Whether the burden of proof was on the appellants or the respondent is, in a case of this character, immaterial here; we try the case *de novo*. In the case of *Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970, speaking of the question of burden of proof in a case somewhat similar to this, we said:

"And, further, it is immaterial to the consideration of this case by this court what the ruling in this respect was, as this court tries the case *de novo*, and will give to the whole testimony such weight as it thinks it is entitled to."

The judgment is affirmed.

PARKER, C. J., and FULLERTON, J., concur.

MACKINTOSH, J. (dissenting)—The testimony introduced to prove the marriage is of two kinds—that which is palpably untrue, and that which is too indefinite to carry any conviction, and its consideration convinces me that, whatever else may have been their relationship, respondent and Orvil H. Emmans never were husband and wife. I therefore dissent.

HOLCOMB, J., concurs with MACKINTOSH, J.

[No. 16412. Department One. September 26, 1921.]

E. A. Swift, *Respondent*, v. H. W. Starrett, *Appellant*.[1]

Appeal (418)—Review—Findings. While the supreme court will hesitate to disturb findings on the facts, it is its duty to do so if convinced that the trial court was wrong.

Brokers (19) — Compensation — Negotiations Direct With Principal. A broker cannot recover commissions upon procuring a customer who is not willing to pay the price fixed, where a sale is made to such customer at a lower price after the expiration of the broker's employment, if the principal in good faith dealt with the purchaser in ignorance of the fact that he was the customer whom the broker had produced.

Appeal from a judgment of the superior court for King county, Griffiths, J., entered February 1, 1921, upon findings in favor of the plaintiff, in an action to recover a broker's commissions, tried to the court. Reversed.

Grinstead & Laube, for appellant.

Tucker & Hyland (Ford Q. Elvidge, of counsel), for respondent.

Bridges, J.—Suit by a broker to recover commissions on a sale. The case was tried by the court without a jury, and defendant has appealed from the judgment against him. While this court will always hesitate to disturb the findings of the trial court upon the facts, yet it is our duty so to do if we feel convinced that that court fell into error. Such is the situation here. A very careful reading and consideration of the testimony convinces us that the plaintiff should not have been permitted to recover. Briefly speaking, the facts are as follows: The appellant, on or before July 10, 1920, owned a certain boat named "On Time

[1]Reported in 200 Pac. 1108.

Again." He authorized the respondent to sell it for $25,000, and agreed to pay a commission of $1,000 in event of a sale. The time given the respondent within which to sell the boat was to expire at noon of July 30. Respondent interested one Williams, who looked over the boat, but thought the price too high. Appellant knew Williams was considering purchasing. Negotiations continued between the appellant and Williams on the one hand and the respondent on the other until the time of the expiration of the broker's contract. At no time did the respondent procure any person who was willing to take the boat on the terms fixed by the appellant. After the expiration of the time within which the respondent might find a purchaser, and during the afternoon of that same day, appellant sold the boat to one McCoy for $20,000. As a matter of fact, McCoy, in making the purchase, was acting as the agent of Williams, the former client of the respondent, but of this fact the appellant had no knowledge until after he had sold the boat.

The respondent vigorously contends, and apparently the trial court held with him in this regard, that the appellant, in bad faith, sold the boat to McCoy, knowing, or having reason to believe, that he represented Williams. The record will not bear out this conclusion. The respondent did not offer any direct testimony to the effect that the appellant knew he was selling to respondent's client, Williams. The respondent's testimony went no further in this regard than to show that the transfer of the boat from the appellant to McCoy, and from the latter to Williams were probably simultaneous, and that appellant was present when the transfer papers from McCoy to Williams were made and executed. In the absence of a satisfactory explanation of these facts, the court might have been justified in concluding that the appellant knew, or

should have known, that he was dealing with Williams. The appellant's testimony, however, completely overcomes any inference which the respondent's testimony made in this regard. The appellant expressly testified that, when he sold the boat to McCoy, he did not know, and had no reason to suspect, that the latter represented Williams. Both McCoy and another person, who was a go-between, establish the correctness of the appellant's testimony in this regard. In fact, the record plainly shows that Williams was undertaking to purchase the vessel by means of a scheme or arrangement whereby appellant would be unable to know that the purchase was being made for him, and that he successfully carried out his scheme. Briefly stated, then, we have the record showing that the respondent's effort to have Williams purchase the boat at the figures and within the time fixed by appellant had failed, and the latter sold the boat to a person who, so far as he knew, had no connection whatsoever with respondent's client, Williams. Under these facts, the respondent was not entitled to recover any commission.

The settled rule of law is as stated in 4 R. C. L. 305:

"To entitle a broker to the payment of his commissions it is essential that he prove not only the actual rendition of all the services called for by his contract of employment, but that he complete the performance thereof within the time stipulated or before the expiration of such additional period as may have been granted by the employer in extension of that originally agreed upon. . . . Moreover, unless a broker has been granted an exclusive agency or the exclusive right to sell, performance must be complete upon his part not only before the expiration of the period for which his employment was to run, but before a sale is effected through the medium of another agent or the independent efforts of his principal. . . . But where there is no fraud or bad faith on the part of the em-

ployer and the broker does not perform within the time limit, the employer after the expiration thereof may contract with a customer introduced by the broker within the period of performance, either upon the same terms or upon others more or less favorable than those the broker was authorized to offer, without incurring any liability to compensate the latter for his services."

Under the facts of this case, not only had the respondent failed within the stipulated time to procure a purchaser of the boat, but the appellant thereafter, without any bad faith, sold it, so far as he knew, to a person who had in no wise been connected with the respondent as a prospective purchaser.

Both parties to this appeal have cited many cases, but they become unimportant in the light of the facts as we feel compelled to find them. The judgment is reversed and the cause ordered dismissed.

PARKER, C. J., FULLERTON, and MACKINTOSH, JJ., concur.

[No. 16393. Department One. September 26, 1921.]

JOHN M. WENTWORTH *et al., Appellants,* v. F. L. PERRIZO, *Respondent.*[1]

TRIAL (150)—FINDINGS—DUTY TO MAKE—EQUITABLE ACTION. Where an action is of equitable cognizance, instead of one at law, no findings of fact and conclusions of law are necessary on the part of the trial court.

JUDGMENT (108) — VACATION—GROUNDS—VIEW OF PREMISES BY JUDGE. An inspection of mining premises by the trial judge in an equitable action to determine whether alleged annual assessment work had been done by a claimant is not ground for vacation of a judgment, when it was done upon notice to the opposing counsel.

SAME (121)—VACATION—TIME FOR APPLICATION. Under Rem. Code, § 465, providing that petition for vacation of a judgment must be filed "not later than after the discovery" of the ground therefor, a petition filed practically a year after knowledge of the alleged ground is not timely filed.

[1]Reported in 200 Pac. 1115.

Appeal from a judgment of the superior court for Okanogan county, Carey, J., entered July 24, 1920, in favor of the defendant, in an action to vacate a judgment, tried to the court. Affirmed.

S. P. Domer and *W. C. Jones,* for appellants.

John T. Mulligan and *Grant & Williams,* for respondent.

Bridges, J.—In an action to which this is supplementary in nature, the plaintiffs, who are the appellants here, alleged that they, as trustees of a certain defunct corporation, were the owners and entitled to the possession of certain mines, located in Okanogan county; that such mines were unpatented, and were situated upon the public domain, and that at all times they had done the requisite amount of work on the mines in the nature of annual assessment work, and had otherwise complied with the law to authorize them to hold possession of such mines, and that subsequently one McKay wrongfully entered upon a part of such mines, and, claiming to be the owner, undertook to convey them to the defendant (who is the respondent here), and that he at once entered upon the ground and commenced and continued to mine such ground, to the damage of the plaintiffs, and that the defendant was insolvent and incapable of responding in damages. Plaintiffs prayed that the defendant be restrained from committing any further waste on the mine, and that an accounting be had, and that their title to the mine be quieted in them, and that the defendant be permanently enjoined from interfering with their possession, and for such further relief as is equitable in the premises. The defendant, by answer, denied that the plaintiffs were the owners of the mine located and prospected by him, and alleged that he alone was the owner, and asked that his title be quieted, and that the

plaintiffs be permanently restrained from interfering with his possession or use of the property. On these issues, the case was tried to the court without a jury, and on October 1, 1919, a judgment was entered in favor of the defendant. So far as this record shows, no appeal was ever taken from that judgment. A little less than a year after the entry of the judgment, the plaintiffs in the original case instituted this proceeding by petition, seeking to have the judgment in the first case vacated and set aside.

The chief reasons given in the petition for vacating the judgment were that the original case was one at law, and the trial court had not made any findings of fact or conclusions of law; and that, after the trial of that action, but before entry of judgment, the trial court, without authority, and in company with the defendant and his attorney in that case, visited the mines for the purpose of inspection, and that between the date of the commencement of that case and the time the court visited the mines, the defendant had wrongfully and fraudulently so covered up and obscured the work which had previously been done by the plaintiffs, as that the court was misled as to the amount of actual assessment work which had been done by petitioners.

The original case was tried before Judge C. H. Neal, and this proceeding was tried before Judge D. H. Carey. Judge Carey, after hearing the evidence, dismissed the petition and refused to vacate the judgment entered in the first case. It is from this judgment that the plaintiffs in the first case, and petitioners in this, have appealed.

It appears that, in the first case, Judge Neal did not make any findings of fact or conclusions of law. The appellants contend that that case was one at law, and since this court has always held that, in such an action

tried without a jury, a judgment cannot stand unless supported by the findings of fact and conclusions of law, they are entitled, as a matter of right, to have that judgment vacated. Appellant claims to have instituted this proceeding under § 465 Rem. Code (P. C. § 8131), which is as follows:

"When the grounds for a new trial could not, with reasonable diligence, have been discovered, but are discovered after the term (time) when the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases, not later than after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action. The facts stated in the petition (complaint) shall be considered as denied without answer. The case shall be tried as other cases by ordinary proceedings, but no motion shall be filed after the final judgment was rendered."

It may be a serious question whether the appellants, in this independent proceeding, can raise the question that the judgment should be set aside because there were no findings of fact or conclusions of law. It may be that the failure of the court to make such findings of fact and conclusions can only be taken advantage of by direct appeal. Such seems to have been the proceeding in the cases where this court has reversed because there were no findings and conclusions. However, this question has not been raised by any of the parties hereto either in the lower court or here. We will not, therefore, decide the question, but will proceed as though the appellant had a right to raise it by this proceeding. Whether the trial court should have made findings of fact and conclusions in the original case is dependent upon whether that case was one on the equity or the law side of the court. The plaintiffs in the original case sought much relief which could be given only by a court of equity. They sought to enjoin the defendant

from interfering with their business and from taking any ore from their mines and for an accounting, and "for such other relief as is equitable in the premises." There can be no question but what the case was of equitable cognizance, and we have always held that in such cases the trial court need not make any findings of fact or conclusions of law.

The only other question discussed by the appellants is that they are entitled to have the judgment vacated because the trial court, after the trial, had wrongfully and without authority viewed the premises in dispute, and under such circumstances as to mislead him as to the extent of the annual assessment work which had theretofore been done by the appellants. It appears that the chief question in the original case was whether or not the appellants here had complied with the law in doing their annual assessment work. It is first contended that the trial court, without knowledge of the appellants or their attorneys, visited the mine in question, and that in so doing it acted without authority and to their prejudice. Judge Carey, before whom that case was tried, found that Judge Neal, during the trial of the original case, had announced in open court that he would view and inspect the premises, and that thereafter he notified one of the attorneys for the plaintiffs in that action (appellants here) of the time fixed by him so to do, and that such date was agreeable to the attorney, who accompanied the judge most of the way to the mine, and consented that the judge might make the view alone; that Judge Neal then visited the mine alone and inspected it, and that "said viewing, inspection and investigation was properly, fairly, justly and honestly made, and no fraud or deception or overreaching was practiced, or attempted to be practiced, upon the plaintiffs." An examination of the testimony in this case convinces us that the find-

ings so made by Judge Carey are correct. There is almost nothing in the testimony to indicate any irregularity in the action of the judge in viewing the disputed premises. Judge Carey further found that the defendant in the original case, "did not at any time before Judge Neal viewed the premises and inspected said premises and property, change or mutilate, obliterate or destroy any work of any kind on said property; that the charges of fraud as contained in the petition of petitioners have not been sustained in any particular by the evidence in this case." This conclusion of the trial court is also sustained by the evidence.

It will be noted that the statute under which the appellants claim to proceed, to wit, § 465 Rem. Code (P. C. § 8131), provides that the petition for vacation must be filed "not later than after the discovery" of the alleged ground for new trial or vacation of judgment. The record here shows that, not only did Judge Neal, before viewing the premises, notify one of appellants' attorneys that he would so do, but that such attorney knew before judgment that such inspection had been made, and that thereafter and before the judgment was made the judge, by letter, advised that attorney that he had viewed the premises, and the judgment itself recites that fact. Under these circumstances, it must be held that the appellants, both before and at the time of making the judgment, knew that the court had visited the premises, and yet their petition to vacate on that ground was not made nor filed until nearly a year thereafter.

We do not find any ground upon which the judgment should be reversed, and it is affirmed.

Parker, C. J., Fullerton, Mackintosh, and Holcomb, JJ., concur.

[No. 16459. Department One. September 26, 1921.]

R. S. HAWLEY, *Respondent*, v. ALMA F. ISAACSON, *Appellant*.[1]

BILLS AND NOTES (22)—CONSTRUCTION—ATTORNEY'S FEES. A promissory note agreeing to payment of "——— dollars" for attorney's fees in case of suit for collection is an express stipulation for a reasonable amount as an attorney's fee.

ABATEMENT AND REVIVAL (18, 19)—GARNISHMENT (57)—DEATH OF PARTY—CAUSES SURVIVING—EFFECT ON GARNISHMENT—DISSOLUTION. The death of a defendant to an action after garnishment proceedings instituted against a debtor, who answers admitting liability to the principal defendant, does not dissolve the garnishment proceedings.

Appeal from a judgment of the superior court for King county, Allen, J., entered January 7, 1921, in favor of the plaintiff, in an action on promissory notes, tried to the court. Affirmed.

C. H. Steffen and *Andrew J. Balliet*, for appellant.

Bronson, Robinson & Jones, for respondent.

BRIDGES, J.—The plaintiff brought suit against Gust F. Isaacson to obtain judgment upon several promissory notes. The notes were on a printed form and contained the following clause with reference to attorney's fees: "and in case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by statute ..... Dollars in like gold coin for attorney's fees in said suit or action." After the commencement of the suit, the original defendant died, and the executrix of his estate was substituted. The case was tried by the court without a jury, and judgment rendered in favor of the

[1]Reported in 200 Pac. 1109.

plaintiff, which judgment included an attorney's fee. The defendant has appealed.

The first question presented is whether any attorney's fee may be allowed on such a note as that above quoted. But one or two cases directly in point have been cited, or found by us. Section 474, Rem. Code (P. C. § 7456), provides: "The measure and mode of the compensation of attorneys and counsellors shall be left to the agreement, express or implied, of the parties . . ." Section 475 of Rem. Code (P. C. § 192), reads as follows:

"In all cases of foreclosure of mortgages, and in all other cases in which attorney's fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable any stipulations in the note, mortgage or other instrument to the contrary notwithstanding; but in no case shall said fee be fixed above the contract price stated in said note or contract."

In the case of *Cloud v. Rivord,* 6 Wash. 555, 34 Pac. 136, the note in suit, in so far as it referred to attorney's fee, read as follows:

" 'If suit or action shall be brought to collect the principal or interest, we promise to pay a collection and attorney's fee in said suit or action, which fee shall be taxed as the attorney's fee in the judgment rendered.' "

It was there properly held that the note constituted a promise to pay a reasonable attorney's fee, which should be fixed by the court. That case, however, lends but little light to this one.

In the case of *Scandinavian American Bank v. Long,* 75 Wash. 270, 134 Pac. 913, the note sued upon, in so far as it had reference to attorney's fees, was in the identical words of the one here sued upon, except a pen line was drawn through the blank. The trial court

there allowed an attorney's fee; this court holding such to be error, said:

"We think it was clearly the intention of the parties in this note to provide for no attorney's fee, because the space left for the amount of the attorney's fee, whether a reasonable or fixed sum, was left blank by drawing the pen across the blank. The clear indication from the note itself is that no attorney's fee was to be allowed."

By drawing a line through the blank space on the note the maker manifestly intended that no attorney's fee was to be allowed. No such manifestation, however, is evidenced in this case. 8 C. J., at p. 1098, lays down the following rule:

"A provision for attorney's fee is enforcible although the amount is left blank."

In the case of *Strough v. Gear*, 48 Ind. 100, the note provided for "An attorney's fee of ..... % if suit be instituted on this note." The court said:

"It is claimed that as the per centum is not fixed in the note, there was no contract to pay any sum for attorney's fees. We think otherwise. We think the appellees were entitled to recover reasonable attorney's fees. The sum allowed was less than that proved. The words 'of ..... per cent.' should be regarded as surplusage."

In this case, if the maker of the note intended that he would not be liable for any attorney's fee in the event of suit, he should have stricken that provision. By the express words of the note the maker agreed to pay an attorney's fee. The only thing lacking is the amount to be paid. It must be held that the maker agreed to pay a reasonable amount as attorney's fee, and that that amount was properly fixed by the court.

A more serious question, however, remains to be determined. At the time the suit was brought, the plaintiff caused to be issued out of the court a writ of gar-

nishment, which was served on the Puget Sound Bridge and Dredging Company, and on May 19, 1919, the garnishee answered, admitting that it was indebted to the defendant in a sum in excess of $2,000. After the original defendant had appeared in the action by motion, but before answer, and after the answer of the garnishee admitting its liability to the defendant, but before judgment thereon, and on May 29, 1919, Isaacson was killed in an accident. After his death, Alma F. Isaacson was appointed administratrix of his last will and testament, and by agreement of the parties she was substituted as defendant. After the death of the original defendant, and in pursuance of stipulation between the plaintiff and the substituted defendant, the garnishee paid to the clerk of the court the money it had owed the original defendant. After judgment for the plaintiff had been entered, he moved the court to direct the clerk to pay to him sufficient of the money in his hands (the same having theretofore been paid to him by the garnishee) to satisfy his judgment, and at about the same time the substituted defendant moved that the garnishment be quashed and the clerk ordered to pay the money to the estate of the deceased. The court granted plaintiff's motion.

Appellant contends that, because the debtor and original defendant died before judgment was rendered against him, and before judgment was rendered against the garnishee, the death abated the garnishment proceedings, and that any moneys owing by the garnishee should be paid into the estate of the deceased for distribution, as provided by law. On the contrary, the respondent contends that it had acquired a right to the moneys garnished, and the death of the defendant could not have the effect of dissolving the garnishment proceedings, or depriving him of his rights acquired by the garnishment.

In 20 Cyc. 1129, it is stated that:

"The general rule is that the death of the principal defendant prior to the rendition of judgment against him thereby dissolves the garnishment proceedings."

14 Am. & Eng. Ency. Law (2d. ed.), 891 says:

"The effect of the death of the defendant upon garnishment proceedings, depending as it does upon the construction of dissimilar statutes, is not the same in the various states. In some jurisdictions it is held that the death of the defendant dissolves the garnishment, while in others the contrary is maintained, and the latter is especially true where judgment has been rendered against the defendant before his death."

The rule as laid down by these two authorities is manifestly based upon certain cases cited by them as supporting the rule, but which cases for the most part have no application here. Those cases decided that a writ of attachment or garnishment was dissolved or abated by the death of the defendant, because the statutes in the states where those cases were decided expressly so provided. In a number of states the statutes expressly provide that the death of the defendant will work a dissolution of the garnishment proceedings if his estate be declared to be insolvent. Some of the cases so holding are as follows: *Farnsworth v. Page,* 17 N. H. 334; *Dow v. Batchelder,* 45 Vt. 60; *Wilmarth v. Richmond,* 11 Cush. (Mass.) 463; *McIlroy v. McIlroy,* 208 Mass. 458, 94 N. E. 696.

It must be conceded, however, that there are a few cases which are not affected by local statutes, holding that the death of the defendant terminates garnishment proceedings, and that the money garnished must be turned into the estate of the deceased. The cases which have come to our attention which so hold are as follows: *Myers v. Mott,* 29 Cal. 359, 89 Am. Dec. 49; *McEachin v. Reid,* 40 Ala. 410; *Reynolds v. Howell,* 1 Marvel (Del.) 52, 31 Atl. 875. The opinion in the first

case cited is the one most thoroughly considered and is by a bare majority of the court. These cases proceed upon the idea that the rights acquired by attachment or garnishment are not fixed but are wholly dependent upon the subsequent recovery of a judgment against the defendant, and if no judgment be obtained, then the garnishment or attachment proceedings must abate; that the plaintiff can acquire no rights which he may enforce, till he has recovered judgment, and that since no judgment can be taken against the decedent's representative, other than to find the amount owing and direct that it shall be paid in due course of administration, the garnishment or attachment must abate. There are cases, however, which are not influenced by local statutes, and which hold that the death of the defendant debtor before judgment does not cause an abatement or termination of the garnishment or attachment proceedings. See *Mitchell v. Schoonover*, 16 Ore. 211, 17 Pac. 867; *Moore v. Thayer*, 10 Barb. (N. Y.) 258, 3 Code Rep. 176, 6 How. Prac. 47; *Bieber v. Weiser*, 1 Wood. Dec. (Pa.) 473; Shinn, Attachments and Garnishments, p. 1113, § 682.

Under such confusion of the text writers and authorities, we must elect to adopt such theory and follow such authorities as appeal to us. While it is true that, under our statutes, the plaintiff does not obtain by his garnishment any fixed and enforceable lien on the money garnished, till he shall have obtained judgment against the defendant, yet he does, prior to judgment, obtain a prior right which cannot be defeated except by failing to obtain his judgment. He may not have a specific lien by virtue of his garnishment, but he certainly acquires a right in the thing garnished. The very authorized purpose of the garnishment is to hold the thing garnished as security for the payment of any judgment he may obtain. Under the statute, the gar-

nishee may not lawfully dispose of the thing garnished, but must hold it subject to the order of the court; the debtor may not collect, assign or in any way dispose of the thing garnished. No person, by a subsequent garnishment or proceeding, can acquire a right in the subject of the garnishment which will be senior or prior to the rights of the first garnishor. Why, therefore, upon principle, should the mere death of the debtor deprive the plaintiff of a right of which he could not be deprived during the life of the debtor? Why should the creditor be deprived of the fruits of his caution and thrift, only because of the debtor's death? The legal representatives should take the property of the deceased debtor subject to the inchoate lien or rights which the creditor obtained by garnishment against the same property in the hands of the live debtor. If, without express provisions of statute, death will not defeat a mortgage, or mechanic's, or any other kind of lien, why should it defeat the inchoate lien or statutory right acquired by garnishment? A receiver will always take property subject to all mortgages, liens, rights and equities. He takes it in just the condition he finds it. We know no good reason why the same rule should not apply in a case of this character. Our statute to the effect that no execution or writ for the enforcement of a judgment against the legal representatives of a deceased shall issue is a general one and applies to proper cases and circumstances. But it is not exclusive and was not meant to cover all instances. As evidence of this idea see § 119 of the 1917 Probate Code, that if a judgment obtained during the life of the debtor "be a lien on any property of the decedent, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands." It seems to us that the conclusion at which we have ar-

rived brings about real justice, and is in accord with our general statutes and the spirit of our laws.

We choose to adopt the theory of the dissenting opinion in the case of *Myers v. Mott, supra,* where it is said:

"The moment the attachment is levied, a lien upon the property attached is acquired. . . . It is a right vested upon the conditions prescribed by the statute. The law favors the diligent and not those who sleep on their rights. The plaintiff incurred the costs of a suit to secure the right given by the statute, and by this means acquired for himself, to the exclusion of all others, the statutory lien on the defendant's property, and a right to be first paid out of its proceeds. This right became vested, and being once vested should not be divested, unless by virtue of some express statutory provision, or by necessary implication from provisions bearing upon the subject-matter. . . . . In this case, by the attachment the plaintiff under the statute acquired a lien upon, and a right to have this demand satisfied out of, the property attached, and, as I think, by no express provision of the statute, or necessary implication from statutory provisions, was the lien lost, or right impaired by the subsequent death of the defendant."

The judgment is affirmed.

PARKER, C. J., FULLERTON, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16281. Department One. September 26, 1921.]

In the Matter of the Estate of MARY HILLE.[1]

WILLS (20)—REQUISITES—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. A will will not be set aside on the ground of being written in a language the testatrix did not understand, if it was executed by her after full explanation in her native language as to its contents.

WILLS (55)—CONTESTS—ATTORNEY'S FEES. Where an action is brought in good faith to contest a will and a prima facie case made out, an award of attorney's fees against contestant in the event his action fails is erroneous.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered September 13, 1920, in favor of the defendants, in a will contest, tried to the court. Affirmed in part and reversed in part.

Davis & Heil, for appellant.

Adams & Miller and *Walter Staser,* for respondents.

BRIDGES, J.—The purpose of this action was to annul a will made by Mary Hille, deceased. Practically the only ground for the contest was that all the will was not read to the testatrix, that she did not understand the English language, and that she did not know or understand what she signed. The lower court sustained the will, and the contestant has appealed.

Within a week before her death, Mrs. Hille requested one of her sons to procure her will to be drawn, and advised him what disposition she wished to make of her property. Complying with her request, the son had an attorney draw the will, and it was then taken to the bedside of Mrs. Hille, who signed it and declared it to be her last will and testament. The testimony of some of those present at the time the will was executed is to the effect that only a portion of the

[1]Reported in 200 Pac. 1034.

will was either read to the testatrix or interpreted to her in German, that being her native tongue. On the other hand, a number of the witnesses testified that all the will was read to the testatrix in English, and that the son who did the reading explained and interpreted it to her in the German language.

It will thus be observed that the question narrows itself down to whether or not all of the will was read to her, and if read, whether she understood its purport. A careful reading of all the testimony convinces us that the whole of the will was read to her and that she fully understood it and knew its contents when she executed it. It would not serve any useful purpose for us to go into greater detail concerning the testimony.

The executor and legatees under the will separately defended. The trial court gave judgment against the contestant for $150 for attorney's fee, on behalf of the defending legatees. Appellant claims that these attorney's fees should not have been allowed. In fixing the attorney's fee, the court stated he felt that the contestant was justified in bringing the action.

Our holding in the case of *Preuss v. Berg,* 102 Wash. 497, 173 Pac. 435, is to the effect that, where the contestant brings the action in good faith and makes a *prima facie* case, attorney's fees should not be awarded against him in the event his action fails. That case is controlling under the facts here. The court therefore erred in awarding attorney's fees against the contestant.

The judgment of the lower court is affirmed in so far as it dismisses the action, and is reversed in so far as it allows attorney's fees against the contestant.

Parker, C. J., Fullerton, Mackintosh, and Holcomb, JJ., concur.

[No. 16392. Department One. September 26, 1921.]

JOE MIRALDI, *Respondent*, v. H. O. WICK *et al.*, *Appellants*.[1]

FRAUD (6, 22)—MISREPRESENTATIONS—RELIANCE ON STATEMENTS—EVIDENCE—SUFFICIENCY. Where the lessor misrepresents the quality of land leased for agricultural purposes, and the lessee has not equal means of knowledge of the existence of sufficient alkali in the soil to prevent the growing of crops, the lessor is liable in damages for the loss suffered by the lessee.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered June 1, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for fraud. Affirmed.

H. J. Snively, for appellants.

D. H. Bonsted, for respondent.

FULLERTON, J.—On April 10, 1919, the appellants, being the owners of one hundred and twenty acres of land situated in Yakima county, leased the same to the respondent for a term ending December 31, 1919, for a cash consideration of nine hundred dollars. The respondent was put into possession of the leased property, and in due season seeded some sixty acres thereof to barley, planted twenty acres to corn, and twenty acres to garden vegetables. The crops seeded and planted failed to mature, and in December, 1919, the respondent began the present action against the appellants to recover in damages, averring in his complaint that the appellants, to induce him to enter into the lease, made false and fraudulent representations as to the quality and condition of the land; the more specific allegation being that the land was represented to be good, tillable farming land, free from any harm-

[1]Reported in 200 Pac. 1094.

ful or deleterious substance, and suitable for the production of all kinds of farm crops, whereas the land contained alkali in such excessive quantities as to render it incapable of producing a crop of any kind. The cause was tried by the court sitting with a jury. The jury returned a verdict in favor of the respondent for the sum of sixteen hundred twenty-nine and 50/100 dollars, and for this sum judgment was entered in his favor. The appeal is from this judgment.

The assignments of error question the sufficiency of the evidence to sustain the verdict and judgment. There was sufficient evidence submitted to the jury to warrant them in finding that the land, because of its alkalied condition, was unsuitable for growing crops of any sort, and that the loss of crops sown and planted by the respondent was due to this condition. There was sufficient evidence, also, to warrant the jury in finding that the appellants misrepresented its condition in this respect. Indeed, the appellants do not seriously dispute the fact that the evidence was conflicting on these propositions. They contend, however, that they were representations upon which the respondent had no legal right to rely, and did not in fact rely, but that he entered into the contract of lease after he had examined the land and was fully informed as to its condition, and that the trial court should have so adjudged as matter of law. But while it is undisputed that the respondent did visit and look over the land prior to entering into the contract, and did while on that visit discover that there was alkali on it, it is disputed that he was then fully informed, or informed at all, of the effect the alkali would have upon growing crops.

The respondent's testimony is to the effect that he is an Italian by birth; that, while he had been in the United States for some twelve years, he had never en-

gaged in farming therein, although he had farmed in his native country in his youth; that, when he started to visit the land, the appellants gave him a letter addressed to a person in charge of the land, instructing the person to show him the land and give him such information concerning it as he might desire; that he visited the land in company with this person, and while on the land discovered that in a few spots the land was covered with a white substance, and on inquiry was told that it was alkali; that he then inquired what effect alkali had on land and was told that too much would hurt, but that the quantity on this land would not interfere in any way with the growing of crops thereon. The respondent further testifies that, on his return to the appellants' offices for further negotiations concerning the lease, he took the matter up directly with the appellants, and was told by them that there was not sufficient alkali on the land to affect the crops; that the small quantity there would act rather as a fertilizer to the crops planted than as an injury to them. He further testified that he had no independent knowledge of the effect of alkali upon land, and that he relied upon the statements of the appellants and their representative concerning its effect. That the appellants had knowledge of the condition of the land, and the effect the alkali would have on crops attempted to be grown thereon, is also supported by evidence; it was testified that the appellants had caused the land to be broken out only a year or so before the time of the lease, had seeded the same to barley, and that the crop had been entirely destroyed by alkali. There was evidence contradictory of all this which would have sustained a verdict for the other side, but the evidence being conflicting, it was the peculiar province of the jury to determine wherein the truth lay.

Unquestionably, as the appellants contend, it is the law that where parties deal with each other as strangers with respect to land, and the means of knowledge concerning it are equally open to both, the one may not say that he has been deceived by the representations of the other, even though the representations be false. But the rule is otherwise where the means of knowledge are not equally open, and here they were not so. The respondent, if his testimony is to be believed, did not know that there was alkali in the land sufficient in quantity to prevent growing crops thereon; and it was the duty of the appellants, if they undertook to inform him on the subject at all, to inform him truthfully, and are answerable for the damages suffered by him if they did not so inform him.

The further contention is that the verdict is excessive. After the crops on the premises failed, the respondent sublet the land for the remainder of his term for pasturage, receiving one hundred dollars as a consideration. It is said that the jury in making up their verdict did not take this into consideration. But the jury were required to and did answer certain special interrogatories, and these plainly show that they made allowance for this sum in their verdict.

The judgment is affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 16468. Department Two. September 26, 1921.]

PETER BANCROFT *et al.*, *Appellants*, v. OLYMPIA COAL & MINING COMPANY *et al.*, *Respondents*.[1]

CORPORATIONS (125, 128)—OFFICERS—ACQUIRING ADVERSE INTERESTS—DEALINGS WITH CORPORATION—STOCK HELD IN TRUST. An officer and stockholder in a mining corporation, who acquires an adjacent tract of land for mining purposes while acting in his own interest and not for the benefit of his corporation nor by the use of any of its funds, does not hold as trustee for his corporation, since there is no violation of any specific duty owed by him to it.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered October 11, 1920, upon granting a nonsuit, dismissing an action to establish a trust, tried to the court. Affirmed.

Walter B. Allen, for appellants.

A. E. Rice and *C. D. Cunningham*, for respondents.

MAIN, J.—The primary purpose of this action was to have certain corporate stock possessed by two or more of the defendants decreed to be held in trust. The action was tried to the court without a jury and resulted in a judgment of dismissal. The plaintiffs appeal.

The facts may be recited briefly as follows: Prior to the year 1917, the Freeborn Coal Company, a corporation, was operating a coal mine near the city of Centralia, in Lewis county. It became financially embarrassed, and in the process of liquidation the Olympia Coal Mining Company, a corporation, was organized and took over the assets of the Freeborn Company and assumed its liabilities. After this the Olympia company continued to operate the mine. The officers of the latter company were D. P. Damascus, president, H. Corapolis, secretary, and B. Codekas, treasurer.

[1]Reported in 200 Pac. 1081.

The foreman or superintendent of the mine was Peter Pergolios. For the purpose of securing funds to operate, the officers named, or some of them, together with the superintendent, entered upon a stock selling campaign, in pursuance of which the plaintiffs purchased and were, at the time of the institution of this action, owners of stock in the Olympia company. Early in the year 1918, the president of the Olympia company made application to the Milwaukee Land Company, a corporation, which owned a large tract of coal land adjacent to the mine, for a lease of additional land. At the same time Peter Pergolios made application for a lease of certain of these coal lands. The result was that the agent of the land company leased to the Olympia company a forty-acre tract and a larger tract to Pergolios individually. The Pergolios tract was on one side of a hill, and that leased to the Olympia company was on the opposite side. There was land between the two, and the respective distances between the mouths of the two mines after the Pergolios tract had been opened was approximately three-quarters of a mile. For the purpose of operating a coal mine under the Pergolios lease, the Victory Coal Mining Company, a corporation, was organized and the rights under the lease transferred to that company. The stock in the Victory company was owned by Pergolios, who owned approximately two-thirds, and by A. Flewllyn, the representative of the Milwaukee company through whom the negotiations for the lease were conducted and who is not a party to this action.

The theory of the action seems to be that Pergolios, in securing the lease from the land company, was acting in concert with the officers of the Olympia company and was violating a duty which he owed to that company. It is claimed by the appellants that, at the time they purchased the stock in the Olympia company, it

was represented to them that that company, through its officers or agents, would acquire a lease to a large tract of coal land from the land company and that it would be operated in connection with the then existing mine. It is this representation that is claimed not to have been carried out, and that by reason of that fact the stock of Pergolios in the Victory company is held by him in trust for the benefit of the Olympia company.

The evidence fails to show that any of the funds of the Olympia company went into the property of the Victory company, upon which had been expended, at the time of the institution of this action, approximately $30,000. From the evidence it cannot be concluded that Pergolios was acting in any other manner than in his individual interest. It is not shown that he held the stock in the Victory company for the benefit of the officers of the Olympia company, or for any of them. In securing the forty-acre tract the Olympia company received all the land which the land company was disposed to lease to it at the time. Pergolios, in securing the lease, causing the Victory company to be organized and acquiring stock therein, under the evidence in the record, did not violate any specific duty that he owed to the Olympia company. *American Circular Loom Co. v. Wilson,* 198 Mass. 182, 84 N. E. 133; *Zeckendorf v. Steinfield,* 12 Ariz. 245, 100 Pac. 784; Fletcher, Cyclopedia of Corporation Law, vol. 4, § 2282.

The question to be determined was largely one of fact, and the trial court reached the correct conclusion.

The judgment will be affirmed.

PARKER, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

[No. 16424. Department Two. September 26, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Good Hope Gold & Copper Mining & Development Company, Appellant,* v. W. W. MORGAN *et al., Respondents.*[1]

MANDAMUS (35)—TO COUNTY BOARD—OPENING COUNTY ROAD—MATTERS OF DISCRETION. Mandamus will not lie to compel a board of county commissioners to repair a road, in the absence of a showing that its refusal was arbitrary or capricious, in view of the fact that Rem. Code, § 5575, vests the board with discretion to open and work only "such roads as are necessary for public convenience."

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered December 20, 1920, upon findings in favor of the defendants, dismissing an action to compel county commissioners to repair a road. Affirmed.

Black & Black, for appellant.

Thos. A. Stiger, for respondents.

MAIN, J.—This was an action of mandamus brought for the purpose of compelling the county commissioners of Snohomish county to repair a certain road. The trial resulted in a judgment dismissing the action, and the plaintiff appeals.

The road in question is between Index and Mineral City, and is in what may be referred to as a remote section of the county. The distance between these two places is approximately nine miles. Seven miles from Index is another place called Galena. The portion of the road more particularly in question is that between Galena and Index. For this distance it follows the left bank of the Skykomish river. The appellant owns

[1]Reported in 200 Pac. 1085.

mining property at Mineral City upon which considerable development work has been done, and it desires the repair of the road in order that it may cause machinery to be taken to its mine, and in turn the ore transported therefrom to the railroad at Index. At or near Mineral City there are a number of other mining properties, upon some of which there has been considerable development work. The valley of the Skykomish is narrow and is not adapted to agricultural purposes. The amount of cleared land in the valley north of Index probably does not exceed fifteen acres, and there are two or three settlers who would be accommodated by the repair of the road.

The road was originally a mining trail, constructed many years ago, and was first used only by pedestrians and pack horses. In time it was widened so as to accommodate vehicles. The county at one time caused it to be surveyed, and from time to time expended money in its improvement until the year 1914, since which time no money has been expended upon it by the county. The road between Galena and Index at places is constructed of puncheon, and follows close to the bank of the river. In the year 1914, owing to high water, a considerable section of the road was destroyed. At the present time, owing to the changing course of the river caused by flood waters, there is approximately a thousand feet of the road that has been entirely obliterated. Logging operations have been conducted on the west bank of the Skykomish and the road has been damaged by these operations, as well as by fires and the flood waters of the river. The respondents were of the opinion that to construct a practical road between Index and Galena would require a relocation of a considerable portion of it and would cost from thirty to sixty thousand dollars. The statute (Rem. Code, § 5575; P. C. § 5975), defining the duties

of the county commissioners, among other things, provides:

"The boards of county commissioners of the several counties in the state shall have general supervision over the roads in their respective counties. They must cause to be opened and worked such roads as are necessary for public convenience, which have been laid out and established according to law. . . ."

By this statute it is made the duty of the county commissioners to open and work such roads "as are necessary for public convenience." Without deciding, it will be assumed that the duty of opening and working roads is ministerial in its nature and in a proper case the commissioners may be required to perform such duty by writ of mandamus. The statute, however, goes further and only makes it the duty of the commissioners to open and work roads which are necessary for public convenience. The determination of the question as to whether the improving of a road is necessary for public convenience necessarily involved the exercise of a discretion. Among things which the commissioners should take into consideration would be the needs of other roads in the county, the cost of the improvement, the practicability of reconstructing the road, the extent of the use of it were it repaired, the amount of funds available, and so forth. The trial court found "that the road from Index to Galena as heretofore surveyed and laid out by the county engineer in 1891, or any subsequent survey, is not practicable or feasible; that there are only about fifteen acres of agricultural land between Index and Galena; that such road constructed to accommodate mining operations was near the bank of the river and that excessive floods have changed the course of the river and completely obliterated some three miles of the road, and that to relocate and reconstruct such road

from Index to Galena over any practicable route would cost from thirty thousand to sixty thousand dollars." The road has not been repaired or in a passable condition for vehicles since 1914, and, as already pointed out, no county money has been expended upon it since that time.

Taking into consideration all the facts in the record, which have been given careful attention, we are in accord with the opinion of the trial court that the commissioners in failing to improve and reconstruct the road did not act in an arbitrary manner, but that, under the facts, they should not be required by mandamus to do the work which is sought to be required of them in this action. It cannot be said that the commissioners arbitrarily or capriciously refused to repair a road which was necessary for public convenience.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, TOLMAN, and MITCHELL, JJ., concur.

[No. 16391. Department Two. September 26, 1921.]

W. S. ROBISON, *Appellant*, v. HENRY A. BARNHART *et al.*, *Defendants*, JOSEPH MEANS *et al.*, *Respondents.*[1]

MORTGAGES (45, 53)—ESTATES OR INTERESTS OF PARTIES—TITLE FROM PURCHASER AT TAX SALE—RIGHT TO FORECLOSE. Where the title to mortgaged premises had passed from the mortgagor to the holder of a tax deed, who sold a portion of the premises to a third party and, in order to effect the conveyance, quit-claimed all the land back to the mortgagor for the purpose of having him convey to the third party, the mortgagee could not enforce his mortgage against the entire tract, inasmuch as the third party was the equitable owner of the portion bought and paid for by him, the mortgagor being merely a medium through which the transfer was made without title vesting in him as to such tract.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered February 5, 1920, upon findings in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Affirmed.

H. A. P. Myers, for appellant.

Coleman & Fogarty, for respondents.

MAIN, J.—The purpose of this action was to foreclose a real estate mortgage. The trial resulted in findings of fact, conclusions of law and a judgment sustaining foreclosure in part and denying it in part. The plaintiff appeals.

The facts may be summarized as follows: On the 19th day of September, 1910, Henry Barnhart and wife were the owners of certain real property in the town of Monroe, in Snohomish county. On this date they executed a note, secured by a mortgage, in the sum of

[1]Reported in 200 Pac. 1076.

$3,000 to one Gabbert. Subsequently certain payments were made upon the principal and interest. On the 27th day of January, 1920, the note and mortgage were transferred to the appellant. At the time of the institution of this action, there was a balance due thereon of approximately the sum of $2,000, with some interest. The taxes and local assessments upon the property were permitted to become delinquent, and on the 4th day of September, 1918, a judgment was entered foreclosing a certificate of delinquency, and on the 23d of that month a tax deed was issued to one Fred Everett. Thereafter, Everett leased the property to Barnhart and wife. On or about the first day of May, 1919, Joseph Means, one of the respondents, desiring to purchase a portion of the property, entered into negotiations with Everett through Barnhart for the purpose of accomplishing that object. The result was that Everett executed a quitclaim deed in blank, in that no grantee was named therein.

Prior to the issuing of this deed, Means had deposited in the bank at Monroe the sum of $1,600, which he was to pay for the portion of the property which he desired and which Everett was to receive in payment for the entire tract, this being the sum which he had invested therein, together with interest and costs. The deed was sent to the bank in this form with the understanding that the name of the grantee was to be filled in and the deed delivered when the money was paid over. At the time of the delivery of the deed, there was some discussion as to whether the deed should be made out to Means and he reconvey to Barnhart a portion which he was not purchasing, or whether Barnhart should be named as grantee and he in turn convey to Means. The result was that Barnhart was named as grantee in the deed, and he conveyed to

Means the portion that the latter was purchasing. Thereafter the present action was brought to foreclose, claiming that, since Barnhart had failed in his duty to pay the tax and that the title had subsequently vested in him, the transaction was nothing more than a redeeming from Everett, and that the mortgagee had a right to foreclose upon the entire tract. This contention is based not alone upon the fact that the deed was made to Barnhart, but on the claimed fact that the sale was made from Everett to Barnhart and that Means purchased from Barnhart. The contention that the sale was one from Everett to Barnhart cannot be sustained. Means entered into negotiations with the purchasers of the property through Barnhart, but the latter in negotiating with Everett was acting for Means, at least in so far as the portion that Means was purchasing was concerned. The money was paid by Means, and even though the title was taken in the name of Barnhart, the former would at all times be the equitable owner thereof, he having furnished the purchase price.

A number of cases are cited by the appellant, but the one claimed to be most closely in point is that of *Finch v. Noble,* 49 Wash. 578, 96 Pac. 3. That case would sustain the holding of the trial court in foreclosing upon the portion of the land the title to which remained in Barnhart, but it falls short of sustaining the appellant's contention that he was entitled to foreclose upon the entire tract. There the one acquiring title after the foreclosure of a certificate of delinquency was in possession of the property under a contract of purchase and was not a third independent party, as here, making the purchase. It was there held that, when one in possession under a contract for conveyance failed to pay the taxes as agreed, resulting in

a tax sale, he could not acquire the title from the purchaser of such tax sale as against his vendor.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, TOLMAN, and MITCHELL, JJ., concur.

[No. 16462. Department Two. September 26, 1921.]

GEORGE C. LEMCKE COMPANY, *Respondent*, v. ANNA NORDBY, *Appellant*.[1]

BROKERS (3, 28)—CONTRACT FOR COMMISSIONS—TERMINATION OF EMPLOYMENT—CANCELLATION OF EARNEST MONEY CONTRACT. An agreement to pay a broker's commission on a sale of real estate if completed under the terms and conditions of an earnest money contract, would not be defeated by the cancellation of the latter contract, where its terms are made part of the commission contract by reference and the canceled contract is still in existence and in evidence.

FRAUDS, STATUTE OF (20)—SALE OF REAL PROPERTY—CONTRACT FOR BROKER'S COMMISSIONS. Where a purchaser was put in possession of property with an understanding that he was to complete the contract, which was canceled by the death of a party, as soon as title could be perfected through the courts, the completion of an oral agreement in substantial compliance with the canceled written contract was sufficient under the statute of frauds.

HUSBAND AND WIFE (12)—DISABILITIES OF COVERTURE—CONTRACTS OF WIFE. Where a wife makes a contract to pay a broker's commission on the sale of community property, she is liable therefor, in view of Rem. Code, §§ 5926, 5927, abolishing the civil disabilities of the wife.

BROKERS (13)—COMPENSATION—PERFORMANCE OF CONTRACT OF EMPLOYMENT. A broker's commission on the sale of real property cannot be defeated on the ground of nonperformance of the contract exactly as made, where the change consisted in the purchaser paying a larger proportion of cash than originally agreed and making a corresponding diminution in the amount of security given for the balance of the purchase price.

Appeal from a judgment of the superior court for King county, Smith, J., entered November 13, 1920,

[1]Reported in 200 Pac. 1103.

upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Ryan & Desmond, for appellant.

Elias A. Wright and *Sam A. Wright,* for respondent.

MITCHELL, J.—This is a suit by the George C. Lemcke Company, a corporation, to recover on a contract, signed and delivered to it by Anna Nordby, for a commission on the sale of real estate. From a verdict and judgment for the plaintiff, the defendant has appealed.

The real property belonged to the community consisting of appellant and her husband, P. F. Nordby. The respondent found a purchaser who, upon the payment of $500 earnest money, entered into a written contract for the purchase of the property. It was signed P. F. Nordby, owner, by John E. Ryan, and also by the purchaser, but was not signed by the appellant. Under the same date, the appellant executed and delivered to the respondent the contract on which the suit is brought. The abstract of title and a deed of conveyance, proposed some days later, were upon examination found to be satisfactory, but the night before they were to be passed and delivered and the remainder of the consideration paid by the purchaser, P. F. Nordby died. The delay in completing the deal caused by his death resulted in changing the full details of the purchaser's contract by a formal cancellation of it and in putting him in possession of the property, with the clear understanding, however, that as soon as proper steps were taken in the probate department of the superior court, the transfer would be made for the consideration originally fixed; and for that purpose the party who by way of loan to the

purchaser was to supply the larger part of the purchase price held the money until some weeks later, and after proper court proceedings had been taken to make the title good, he furnished it to the purchaser, who in turn paid it, together with the other considerations for the deed of conveyance.

By several assignments of error it is contended that the contract of the appellant to pay a commission was terminated by the cancellation of the earnest money contract, because by the terms of her contract she agreed to pay the commission if the purchaser completed the purchase "under the terms and conditions" of the earnest money contract. The argument is that the cancellation of the earnest money contract deprived the contract sued on of some of its essential terms. We think it does not have that effect. The contract sued on, since it refers to the other, is to be construed as if that other to that extent was incorporated in it, and the cancellation of the other, being between entirely different parties, in no way depreciates its value. The one that was cancelled is in existence and is in evidence in this case. Nor was it cancelled until the purchaser was put in possession of the property with the understanding that he was to complete the contract as soon as the title to the property could be perfected through the court; and there is abundant evidence, though disputed by the appellant, to have satisfied the jury, as it evidently was satisfied, that the contract was fully completed by the purchaser by a substantial compliance with the terms of the contract as written and thereafter orally agreed, prior to the commencement of this suit. The same reasons answer the argument of the appellant that the contract in suit, to the extent it refers to the cancelled contract, is defective under the statute of frauds.

Under another collection of assignments of error it is contended the appellant is not individually liable for the reason that the real estate was community property and that the respondent was dealing with the community and not with Mrs. Nordby. But she made the contract. All former laws which imposed civil disabilities upon a wife which were not recognized as existing against the husband have been abolished by statute (Rem. Code, § 5926) and her contracts and liabilities may be enforced (Rem. Code, § 5927).

Next it is contended there was no performance of the contract. The purchaser procured by the appellant concluded the purchase of the property upon terms entirely satisfactory to the seller, who made some changes by way of exacting a larger amount of cash than mentioned in the original written contract, and a consequent change in the amount of property and securities given for the remainder of the total purchase price.

Lastly, it is contended the court failed to instruct the jury on the meaning of "preponderance of the evidence" and "credibility of the witnesses." The appellant requested no such instructions, but the record before us shows that the court did give proper instructions on both of those matters.

Judgment affirmed.

PARKER, C. J., MAIN, BRIDGES, and TOLMAN, JJ., concur.

[No. 16513. Department Two. September 26, 1921.]

ELIZABETH M. BOUNDS, *Respondent*, v. MINNIE E. GALBRAITH, *as Executrix of the Estate of Archie R. Galbraith, Appellant.*[1]

HUSBAND AND WIFE (12)—DISABILITIES OF COVERTURE—DEBTS CONTRACTED BY WIFE. Under Rem. Code, § 5927, imposing liability upon a wife for her contracts to the same extent as if she were unmarried, she is liable upon her promise to pay a community debt.

FRAUDS, STATUTE OF (4)—PROMISE TO PAY DEBT—COLLATERAL OR ORIGINAL PROMISE. In an action for services performed for defendant and her deceased husband, an allegation of the complaint that defendant "would pay and cause to be paid" the reasonable value of the services to be rendered does not set up a collateral promise but alleges a positive promise to pay, not the debt of another, but her own debt.

APPEAL (454)—REVIEW—HARMLESS ERROR—FACTS OTHERWISE ESTABLISHED. Refusal to strike the testimony of plaintiff as to the reasonable value of her own services is not prejudicial, where the same value is elicited by the testimony of two competent witnesses.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered December 31, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

F. E. Langford and *Lucius G. Nash*, for appellant.

John M. Gleeson and *Corkery & Corkery*, for respondent.

MITCHELL, J.—The respondent brought this action to recover for personal services rendered to the appellant from September 15, 1904, to November, 1916. The trial resulted in a verdict and judgment for the respondent in the sum of $4,290.30, against only Minnie E. Galbraith individually, from which she has appealed.

[1]Reported in 200 Pac. 1082.

Appellant is the surviving wife of Archie R. Galbraith, deceased. Respondent is the daughter of Archie R. Galbraith, deceased, by a former wife. In her original complaint against the appellant as sole defendant, respondent alleged that, about September, 1904, "at the request of the defendant and Archie R. Galbraith," she worked upon their ranch, and continued to do so until about November 1, 1916, that the work consisted of cooking for the family and farm hands, housework, including washing and ironing, milking cows, feeding pigs and chickens, and work in the harvest fields, picking fruit, and aiding in clearing land; "that shortly after plaintiff began work, defendant and the deceased Galbraith promised the plaintiff if she would continue to work . . . that they would pay her well out of the proceeds of the sale of the ranch when such sale should be made, and that said ranch was sold for $25,000 in August, 1918;" that plaintiff has not been paid, and that $2 per day is reasonable for her services. By leave of court, the complaint was amended by making Mrs. Galbraith, in her capacity as executrix of her deceased husband's estate, an additional party defendant. In the amended complaint, after alleging as formerly that she worked for them at their request, and describing the work performed, she then alleged, among other things:

"That shortly after plaintiff began said work, and on or about the 15th day of September, 1904, in Spokane county, Washington, the defendant, Minnie E. Galbraith and her then husband, the said Archie R. Galbraith, deceased, entered into a contract and agreement with plaintiff by the terms and conditions of which the plaintiff was to do and perform and render services to them and to be paid for said work the reasonable value thereof; and at said time the said Minnie E. Galbraith, on her own behalf and in her own capacity as an individual and for the purpose of induc-

ing and persuading this claimant to enter into this agreement, promised and agreed that she, the said Minnie E. Galbraith, would individually pay and cause to be paid to this plaintiff the reasonable worth and value of the work and services to be rendered, which said payment was to be made at the time the said Minnie E. Galbraith and Archie R. Galbraith, deceased, should sell and convey, or dispose of their said ranch; and that on or about August 15th, 1918, said ranch was sold by said Galbraiths."

While there is a conflict in the testimony, there is ample credible evidence to support all of the material allegations of the amended complaint that were controverted by the answer. Respondent testified, by questions and answers, as follows:

"Q. What, if any, conversation did you have with the defendant Mrs. Galbraith in the fall of 1904, the fall or summer of 1904, down on College avenue with regard to your going out on their ranch? A. She wanted me to go out and do the housework. Q. What did she say about pay? A. That I would get my money when the ranch was sold. Q. Did she say who would pay you? A. She would pay me. Q. You state to the jury whether or not you went out to the ranch pursuant to that conversation. A. I did."

Furthermore, two other witnesses, wholly disinterested, testified that once to each of them during the twelve years, in the absence of the respondent, the appellant stated that she was paying wages to the respondent. The respondent testified, and was corroborated, to her performing the services and labor as alleged during the whole of the twelve years, and admittedly she had been paid nothing for her services, for the defense was that she was a member of the family, treated as such, and that all her services were gratuitous.

Assignments of error 1 and 5 are that the court should have sustained a demurrer to the complaint and

an objection to the introduction of evidence upon the ground that no cause of action was alleged. The contention is that the allegations show that the obligation charged was a community debt for which the wife is not individually liable. That rule does not apply in cases such as this. Section 5927, Rem. Code (P. C. § 1430), provides: "Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried."

Assignments 2 and 3 are predicated on the refusal of the court to strike, and to sustain a demurrer to, the amended complaint. The argument is that, as the original complaint did not state a cause of action, there was nothing to amend. In our opinion, there is no merit in the point.

Assignment 4 is that appellant's motion for judgment on the pleadings should not have been denied. Because there was no denial of an alleged affirmative defense setting up the statute of frauds, it is argued that "the sole question involved in the motion under discussion is whether the promise, as alleged, is within the statute of frauds." That is, it is contended that the allegations in the amended complaint, viz.:

"And at said time the said Minnie E. Galbraith on her own behalf and in her own capacity as an individual, and for the purpose of inducing and persuading this claimant to enter into this agreement, promised and agreed that she, the said Minnie E. Galbraith, would pay and cause to be paid to this plaintiff the reasonable worth and value of the work and services to be rendered,"

is a collateral and not an original promise, particularly because of the words that she "would pay or cause to be paid." The language referred to is entitled to no construction inconsistent with the charge

that Mrs. Galbraith made a direct and positive contract and promise to pay, not the debt of another, but her own debt.

Assignment 6 is that the refusal to strike certain testimony of the respondent to the effect that Mrs. Galbraith, in the fall or summer of 1904, wanted her to go out to the farm and do housework, that she would pay when the farm was sold, and that she did go out to commence work in September, 1904, was prejudicial error. The argument is that the testimony is inconsistent with the allegation that, after she began work, the appellant and her then husband agreed to pay her for her services when they sold the ranch. The testimony moved against went in by questions and answers, without any objection on the part of the appellant; and furthermore, the terms and conditions of the agreement, as testified to and pursuant to which the services were rendered, were identical with the allegations of the complaint so far as Mrs. Galbraith is concerned.

Assignment 7 is that the court erred in denying a motion to strike the testimony of respondent regarding the reasonable value of her own services. Without setting out that which the record shows concerning her means of knowledge, and without discussing the competency of her testimony, we are convinced the motion to strike was properly denied. No prejudice could arise thereon anyway, for two disinterested qualified witnesses fixed the same value as that testified to by the respondent, which in the total exceeds the amount of the verdict and judgment.

Assignments 8 and 9 are that the court erred in denying appellant's motion that the action be dismissed as to her individually, after respondent had rested her case in chief, and upon the whole proof, in

refusing to instruct the jury to return a verdict for the appellant. Enough has been said already to show that the case was one for the jury.

Assignments 10 to 15, inclusive, rest upon the refusal of the court to give certain instructions requested in writing by the appellant. They are not set out in the brief. They have been examined, however, and found not to be applicable, with one exception, in this case. As to that one, it was given in substance and legal effect.

Assignments 16, 17 and 18 are that the court erred in certain instructions that were given. Examination and consideration of them show they were plainly correct, clear and to the point.

The contentions made in assignments 19, 20 and 21 that there should have been no denial of appellant's motion *n. o. v.*, that the motion for a new trial was improperly denied, and that entry of judgment upon the verdict was unwarranted, are, each and all, without merit and require no distinctive discussion.

Affirmed.

MAIN, BRIDGES, and TOLMAN, JJ., concur.

[No. 16572. Department Two. September 26, 1921.]

FIRST NATIONAL BANK OF BREMERTON, *Appellant*, v. GUARDIAN TRUST & SAVINGS BANK, *Respondent*.[1]

BANKS AND BANKING (14)—VALIDITY OF LOAN—AUTHORITY OF OFFICERS—NOTICE OF FRAUD. Where the president and executive officer of one bank pursued a policy of discounting commercial paper and opening a credit account thereon with another bank, on the representation that they were bona fide loans to solvent borrowers which his bank could not handle, the transaction was not on its face so out of the ordinary course of business as to put the discounting bank on inquiry as to any fraudulent intent of such officer to appropriate the money to his personal use; and hence the discounting bank cannot be held liable to the other bank for the defalcation of the money by the latter's president.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 22, 1920, upon granting a nonsuit, dismissing an action to recover funds alleged to belong to a bank through the fraud of an officer. Affirmed.

Poe & Falknor and *Piles & Halverstadt*, for appellant.

Roberts & Skeel and *J. J. Geary*, for respondent.

TOLMAN, J.—For some years prior to September 25, 1917, one C. E. Thomas was the majority stockholder, a director, and president and chief executive officer of the appellant bank. In the year 1916, Thomas made an arrangement with the respondent bank by which he, Thomas, might discount with the respondent commercial paper guaranteed by him personally, the proceeds to be placed to the credit of the appellant and retained by respondent until the discounted paper was paid. In March, 1917, Thomas so discounted a note made by one G. B. Colvin for $2,000, payable to him-

[1]Reported in 200 Pac. 1095.

self and indorsed by him. In April, 1917, he drew his own note for $1,000 to the order of respondent, and deposited it with the respondent to the credit of appellant; and in September, 1917, he discounted with respondent under the same arrangement a note for $1,250, made by the Bremerton Lumber Company to his order and indorsed by him. The appellant bank never had any interest in any of these notes and knew nothing of either transaction until the later discovery hereinafter referred to. As each of these notes was discounted its proceeds were placed to the credit of appellant, and Thomas made an entry upon appellant's books showing that it had such credit with the respondent, and immediately, to balance such credit, withdrew an amount of money equal thereto and applied it to his own use. The discounted notes were renewed from time to time, and finally, being unpaid, they were charged back against appellant's credit account created by their discount in the respondent bank, thus extinguishing that credit.

Other notes were discounted in the same way which were paid, and hence are immaterial here except as they involved another officer of the appellant bank.

These transactions were discovered on or about September 25, 1917, and thereupon the directors of the appellant bank, acting in conjunction with the national bank examiner, forced Thomas to resign his official positions and turn over his stock in the bank, and other property, as security for his indebtedness to the appellant.

After the discovery and the resignation of Thomas, the appellant notified the respondent that Thomas was no longer authorized to sign drafts for it, and supplied respondent with new authorized signatures, and thereafter the appellant drew its draft on the respond-

ent against this account for $3,500, which draft was dishonored and returned unpaid, whereupon this action was brought to recover from respondent the Thomas shortage up to the full amount of the credit created in appellant's favor by the discount of the notes referred to.

The case was tried to a jury, and at the close of plaintiff's evidence, respondent challenged the sufficiency of the evidence and moved for judgment, which motion was granted and a judgment entered accordingly, from which this appeal is prosecuted.

The vital point to be here decided, as we see it, is, were the transactions between Thomas and the respondent bank of such a nature as to put the respondent on notice that Thomas intended thereby to defraud the appellant.

Mr. Harrison, who was vice-president of the appellant during the operations referred to, and who succeeded Thomas as president, caused his own note to be discounted in the same way and through the same channels, and upon the witness stand he confidently asserted that his was an entirely legitimate transaction because his note was paid. Assuming that to be true, does it not follow that respondent bank, having no reason for a contrary belief, was justified in believing that Thomas was also acting in a legitimate manner, with no intention to do otherwise than to assist the bank of which he was president, and its customers? Thomas represented to respondent that these were *bona fide* loans to solvent borrowers, which his bank could not handle, and since his bank was not in any way bound on the paper discounted, and did receive to its credit the proceeds of the discount, why should respondent question the transaction?

Such transactions present on their face nothing so out of the ordinary course of business as to put the

discounting bank on inquiry as to a possible fraudulent intent, and have often been upheld by the Federal courts. *Chemical Nat. Bank v. Armstrong,* 76 Fed. 339; *Rankin v. City Nat. Bank,* 208 U. S. 541; *Cherry v. City Nat. Bank,* 144 Fed. 587. See, also, *Chemical Nat. Bank v. Armstrong,* 50 Fed. 798, and *Aldrich v. Chemical Nat. Bank,* 176 U. S. 618.

We conclude that the evidence offered by appellant was insufficient to support a verdict in its favor, and therefore the judgment of the trial court was right.

Judgment affirmed.

PARKER, C. J., BRIDGES, MAIN, and MITCHELL, JJ., concur.

[No. 16417. Department Two. September 26, 1921.]

ELLA C. MOTLEY, *Appellant,* v. JOHN W. MOTLEY, *Respondent.*[1]

DIVORCE (8)—GROUNDS—INABILITY TO LIVE TOGETHER. Extravagance on the part of the wife and incompatibility in the temperament of the spouses are insufficient grounds for decreeing a divorce to a husband.

HUSBAND AND WIFE (105)—SEPARATE MAINTENANCE—RIGHT TO. Where a husband leaves a wife without sufficient cause, she is entitled to an allowance for separate maintenance if she is without adequate means of support.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered October 11, 1920, in favor of the defendant upon his cross-complaint, in an action for separate maintenance, tried to the court. Reversed.

Rummens & Griffin, for appellant.

E. L. Turner, for respondent.

[1]Reported in 200 Pac. 1099.

TOLMAN, J.—The appellant, as plaintiff, brought this action seeking a decree for separate maintenance, and respondent, in addition to defending against that claim, by cross-complaint sought an absolute divorce. From a decree granting to the respondent a divorce upon his cross-complaint, this appeal is prosecuted.

Appellant had been previously married and divorced from her first husband, and by the decree in that case she had been given the custody of four minor daughters, and alimony of $75 per month. Upon the oldest daughter becoming of age, this alimony had been reduced to $60 per month, and upon her marriage to respondent, the alimony was further reduced to $45 per month. The parties hereto had been acquainted with each other for a number of years prior to their marriage on March 25, 1918, and respondent was familar with all the conditions. Shortly after the marriage, the new family removed from Seattle to Richmond Beach to be near respondent's place of employment, where they purchased a small acre tract with the intention of building a home thereon. The home was never built, but some $1,100 was paid upon the purchase price of the acre tract, and $600 or $700 spent in improvement and preparation for building, and at the time of the trial below there was owing on the purchase price of the land something over $1,400, a portion of which was overdue.

At the time of the marriage, appellant had nothing but a modest supply of household furniture, and the alimony before referred to, while respondent had about $3,000 in money and securities, and has since been steadily employed at good wage, and is now earning $150 per month. No serious trouble developed until November, 1919, when differences arose, chiefly because respondent claimed, and no doubt honestly be-

lieved, the family was spending too much money. As a result they ceased to cohabit, and thereafter occupied separate rooms until January, 1920, when respondent left the home and the family, taking with him all the ready money and leaving nothing for the support of the family save a cow, which he had theretofore presented to the wife, and some pigs and poultry; notifying the merchants with whom they had theretofore dealt that he would not be responsible for debts contracted by the wife. For some six months thereafter the family existed upon the alimony from the wife's former husband, the proceeds of the livestock, upon credit, and a very small contribution made by respondent towards her support, through the intercession of others. Then, her means being exhausted, and a very considerable grocery bill having been incurred, which is still unpaid, she brought this action, asking for $65 per month as separate maintenance, suit money, attorney's fees, and other relief.

The gist of the respondent's cross-complaint, and of the evidence offered in support of these allegations, is that the wife was without affection for the husband, married him as a means of obtaining support for herself and her children; that she spent too much money, though no particular instances of extravagance are shown, and that they were incompatible in temperament. The chief argument advanced in support of the decree entered below seems to be that the respondent had $3,000 when he married, had earned nearly as much more since the marriage, and had left at the time of the trial only some $600. Hence the conclusion is drawn that the wife was concerned only with the obtaining of all he had and could earn. But when it is remembered that over $1,700 was paid on the purchase of the land and the preparations for building, the force of this argument is considerably les-

sened, and when the high cost of living during the time since the marriage is also considered, to say nothing of the ill-health of the wife and one of her daughters and the expense attendant thereon, these figures fall far short of convicting the wife of undue extravagance, or of a design to fleece the husband of his accumulations.

It may be that, when a man marries a woman with four dependent daughters, he does not become bound to do for the daughters all that he might cheerfully do for his own, yet he does assume a moral and a legal responsibility to assist the wife and mother to a reasonable extent in providing for her minor and dependent children properly, and in accordance with his means. We find nothing in the record here to convince us that respondent was called upon to do more.

The allegations of the cross-complaint, and the evidence viewed from the standpoint most favorable to him, fail utterly to show that the respondent has any ground which can be recognized as sufficient to entitle him to a divorce. If in these days every family which spends too much money is to be broken up; if coldness, or even sarcasm, or both, following upon differences of opinion upon financial matters, is to be recognized by the courts, then, indeed, the homes of America are in danger. The decree should have been denied under the authority of *Ellis v. Ellis*, 77 Wash. 247, 137 Pac. 453, and the cases there cited, and the parties should have been admonished that it is the duty of both husband and wife to bear and forbear for their own best good, and for the good of the state and of society generally.

Respondent having, without sufficient cause, left the appellant without adequate means of support, she is entitled to separate maintenance. *Loeper v. Loeper*, 81 Wash. 454, 142 Pac. 1138.

A careful consideration convinces us that at this time appellant will require, and respondent is able to pay to her, fifty dollars per month. We also find that, in view of the husband's present financial ability, an allowance of $150 as attorney's fees should properly be made.

The judgment will be reversed, and the cause remanded with directions to enter a decree requiring the respondent to assume responsibility for the grocery bill contracted since his desertion of his wife, and in addition that he pay to her $50 monthly as separate maintenance, and $150 as attorney's fees, with leave to either party to apply for any modification warranted by a change of conditions.

Reversed and remanded.

PARKER, C. J., MITCHELL, FULLERTON, and MAIN, JJ., concur.

[No. 16351. Department Two. September 26, 1921.]

A. G. SCHROEDER, *Respondent*, v. THE CITY OF RAYMOND *et al.*, *Defendants*, R. H. COSHUN *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS (300)—PARTIES—SPECIAL ASSESSMENTS—FORECLOSURE OF LIEN. The holder of local improvement bonds made payable to bearer may properly maintain an action to foreclose the lien of delinquent assessments out of which such bonds are made payable, where such bonds, properly executed, are produced in court and admitted in evidence, notwithstanding others may have some financial interest in them.

SAME (295)—ACTIONS FOR SALE OF LAND—DEFENSES. The foreclosure of a lien represented by a certificate of delinquency for general taxes would not bar foreclosure proceedings for special assessments, in view of Rem. Code, § 7892-40, providing that one foreclosing for general taxes shall either pay in full all local assessments or may proceed to acquire title to the property subject to certain or all of the local assessments that are a lien thereon.

[1]Reported in 200 Pac. 1092; 204 Pac. 180.

TAXATION (147, 161)—FORECLOSURE OF CERTIFICATES—CONDITIONS PRECEDENT—SCOPE AND EXTENT OF RELIEF. Where a holder of a certificate of delinquency does not pay local assessments before foreclosing, he elects to take subject to the local assessments; and the court has power to grant only the statutory relief, which will be read into the decree, its terms going beyond it and barring all such claims being of no force.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered October 15, 1920, in favor of the plaintiff, in an action by bond holders to foreclose special assessment liens, tried to the court. Affirmed.

Preston, Thorgrimson & Turner, for appellants.

Paul Holbrook, for respondent.

TOLMAN, J.—The respondent, as plaintiff below, brought this action as owner of certain local improvement bonds issued by the city of Raymond, to foreclose the lien of the delinquent assessments out of which such bonds are payable, under and by virtue of § 7892-51, Rem. Code (P. C. § 1039), the city having failed and neglected to pay the bonds or collect the assessments. The appellants were made parties defendant because of holding legal title to the property in question under tax deeds theretofore issued to them. The assessments were wholly delinquent and unpaid upon the property to which the appellants so held title.

Appellants defended upon the ground that on May 7, 1912, appellant R. H. Coshun paid delinquent taxes upon the property in question for the years 1907 to 1910, inclusive, amounting to $339.10, and received a delinquency certificate therefor from the county treasurer, and thereafter paid to the county treasurer taxes for subsequent years, making a total investment of $1,942.10; and in January, 1916, more than three years subsequent to the original date of delinquency of the tax included in the certificates of delinquency, Coshun,

in a proper proceeding brought in the superior court for Pacific county, sought a judgment foreclosing his tax lien upon the property. In such tax foreclosure proceedings the holder of the legal title was made defendant, as was also the city of Raymond, and all persons shown by the records of the county to have any interest in the property, including "all persons unknown, if any, having or claiming to have any interest therein." In the complaint in that action it was stated that the city of Raymond claimed some interest in, or lien upon, the lands in question, but that such lien or interest, if any, was subject to and inferior to the lien for general taxes, and Coshun prayed that his tax lien be adjudged a first and paramount lien against the property, and that the defendants therein, and each of them, be barred and foreclosed of all interest, right, or estate in the premises or any part thereof. Due service was made upon the city of Raymond in the manner provided by law, and in addition the then city attorney of the city of Raymond was personally asked if he would appear in the case and set up the city's claim under the assessment for local improvements, and that default was delayed for several months until the city officials decided not to appear in said action, whereupon a decree of foreclosure was entered in which it was recited:

"It is further ordered, adjudged and decreed that said lien be and the same is hereby foreclosed and that the defendants above named; also all persons unknown, if any, having or claiming to have any interest or estate in or to said property and each of them and all persons claiming by, through or under them, be and they are hereby barred and foreclosed of any and all right, title, estate, lien or interest in or to said property or any part thereof, and all equity of redemption therein from and after the issuance of tax deed based on sale made pursuant hereto, and that such tax deed

shall convey the realty so sold in fee simple clear of all incumbrances."

The bonds held by respondent are payable to bearer and are transferable by delivery, and presumably the making defendant of parties unknown who might have or claim an interest in the property was done for the purpose of binding the holders of the bonds.

Pursuant to the entry of the decree from which we have quoted, and under its terms, the property was duly offered for sale, at which sale appellants acquired title by tax deed to the property involved in this appeal. From a decree and judgment foreclosing the lien of the special assessments as prayed for in the present action, the defendants Coshun have appealed.

Their first contention is that respondent is not the real party in interest and therefore is not entitled to maintain this action. It appears, however, that the bonds were payable to bearer; that respondent was in possession thereof; produced them in court; they were found to be properly executed, and were admitted in evidence, and notwithstanding some testimony to the effect that others may have had some financial interest therein, we think respondent had sufficient title to enable him to maintain the action.

"The law is well settled, that where a note is payable to bearer, or is indorsed in blank, a suit may be maintained in the name of any person who is the holder of the note, without being required to show an interest in it. The court will not inquire into his right to the paper, or his right to maintain a suit upon it, unless circumstances appear showing his possession to be *mala fide*. That no injustice may result from this rule, it is also settled, that, when the plaintiff on the record is a mere trustee for another, the defendant may avail himself of any defense which he might set up against the real owner of the instrument, provided the action had been brought in his name. Nor is it a good plea

to allege that the note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff." 3 R. C. L., p. 990, § 198.

The main contention of appellants is based upon the sustaining by the trial court of the demurrer to their affirmative defense setting up the decree in the action to foreclose the lien for general taxes as a bar, it being contended that the city of Raymond was made a party defendant in that case for the sole purpose of foreclosing it, and through it the holders of the local improvement bonds; and that, the court having had jurisdiction, the decree from which we have quoted extinguished the lien of the local improvement assessments.

We consider it unnecessary to enter into a discussion concerning what would have been the effect of a decree in the tax foreclosure case had it been the ordinary action in equity, or an ordinary action for the purpose of establishing either a legal or equitable right, because we are convinced that it was neither; but was a purely statutory proceeding brought under the statute and controlled thereby. Before appellants bought the certificate of delinquency which they sought to foreclose, the legislature in 1911 enacted what is now Rem. Code, § 7892-40 (P. C. § 1028), which reads:

"The holder of any certificate of delinquency for general taxes shall, before commencing any action to foreclose the lien of such certificate pay in full all local assessments or installments thereof outstanding against the whole or any portion of the property included in such certificate of delinquency, or, he may elect to proceed to acquire title to such property subject to certain or all local assessments a lien thereon, in which case the complaint, decree of foreclosure, order of sale, sale, certificate of sale and deed shall so

state. If such holder shall pay such local assessments, he shall be entitled to fifteen per cent interest per annum on the amount of the delinquent assessments or delinquent installments thereof so paid, from date of payment.

"In any action to foreclose any lien for general taxes upon any property a copy of the complaint shall be served on the treasurer of the city or town within which such property is situate within five days after such complaint is filed. In any case where any property shall be struck off to or bid in by the county at any sale for general taxes, and such property shall subsequently be sold by the county, the proceeds of such sale shall first be applied to discharge in full the lien or liens for general taxes for which the same was sold, and the remainder, or such portion thereof as may be necessary, shall be paid to the city to discharge all local assessment liens upon such property, and the surplus, if any, shall be distributed among the proper county funds."

This act was upheld in *Holzman v. Spokane,* 91 Wash. 418, 157 Pac. 1086, and *Lawrence v. Tacoma,* 103 Wash. 86, 173 Pac. 1017.

We therefore hold that appellants, who bought the certificate of delinquency subject to the terms of this statute, were at all times bound thereby, and in a statutory foreclosure of such certificate, the court had no power to grant other than the statutory relief, hence the language of the decree which goes beyond what the statute directs is of no force or effect. Appellants had a right of election under the statute to either pay the local assessments in full before commencing the action to foreclose, or, as the only alternative, to acquire title through the foreclosure, subject to the lien of the local assessments. Such acquisition of title, subject to the lien of the local assessments, would not prevent a testing of the validity thereof in any manner or at any time which would have been open to the

original owner, but no question is here raised as to the validity of the local assessments. Not having paid the local assessments, appellants must be held to have elected to take title subject thereto. The court having the power to grant only the statutory relief, the language of the statute must be read into the decree, and such being the effect of the judgment appealed from, that judgment must be and is affirmed.

PARKER, C. J., MAIN, MITCHELL, and BRIDGES, JJ., concur.

ON REHEARING.

[*En Banc.* February 6, 1922.]

PER CURIAM.—This cause was reargued before the court *En Banc* on January 25, 1922. Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of Department Two, the judgment is affirmed for the reasons therein stated and as therein directed.

[No. 16280. Department Two. September 30, 1921.]

FRANK N. GLASGOW *et al., Respondents,* v. LAURENCE BRECHT *et al., Appellants.*[1]

FRAUD (8, 22)—MISREPRESENTATIONS—RELIANCE UPON—MEANS OF KNOWLEDGE—EVIDENCE—SUFFICIENCY. The purchaser of a farm of 260 acres is entitled to recover damages for fraud where he relied on representations of the seller that there were 200 acres in cultivation when in fact there were but 140 acres cultivated, and the truth could not be readily ascertained, except by means of a scientific survey because the farm was located in the foothills, and the land under cultivation was so irregular in shape and of such topography that it could not be seen all at one time from any elevated point.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered March 26, 1920, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for fraud. Affirmed.

Cary M. Rader and *John C. Hurspool,* for appellants.

Sharpstein, Smith & Sharpstein, for respondents.

MAIN, J.—The plaintiffs purchased from the defendants a farm, and having concluded that they were defrauded, brought this action for damages. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiffs in the sum of $2,500. A motion for new trial being made and overruled, judgment was entered upon the verdict. The defendants appeal.

The appellants were the owners of a farm in Walla Walla county, consisting of 260 acres. In May, 1919, this was purchased by the respondents for the sum of $30,000. Before making the purchase they visited the

[1]Reported in 200 Pac. 1089.

farm on two occasions, the first time only making a casual examination thereof. Upon the second visit they were accompanied by the representative of the appellants, and they looked over the place somewhat carefully. The action grew out of a representation which the respondents claimed was made to them to the effect that there were two hundred acres of land under cultivation. After possession of the farm had been taken, the respondents caused it to be surveyed, with the result that they were apprised that but approximately 140 acres of the land was in cultivation. The appellants, in their answer, denied that any representation was made as to the number of acres in cultivation or in the pasture. The farm was situated in what is called the foothills, and the land in cultivation was irregular in shape and of such topography that it could not all be seen at one time from any elevated point. It was also divided by a road.

The principal contention of the appellants appears to be that the evidence was not sufficient to carry the question of false representation to the jury, and that therefore the court erred in failing to grant their motion for a new trial. In support of this position, two facts are largely relied upon: First, that the respondents visited and looked over the farm before its purchase; and second, that no representations were made. Upon the second question the evidence was conflicting and the jury had the right to believe that offered by the respondents, which was that there was a positive representation made to them that two hundred acres of the land was in cultivation. Upon the question as to whether the respondents should be denied a recovery because they visited and looked over the farm before its purchase, the case is strikingly similar to that of *George v. Kurdy*, 92 Wash. 277, 158 Pac. 965. There

the plaintiff, claiming to have been defrauded, had looked over the land which was upon a knoll or hillside, irregular in shape and was covered with brush and small trees. It was there said:

"The appellants claim that, since George visited the land and had an opportunity to investigate, he is not in a position to claim that any false representations were made to him. The rule is, that the vendee may rely upon the recommendation of his vendor where, for any reason, the falsity of the representations is not readily ascertainable. *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585; *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65. This rule is applicable to the one hundred acre tract, or that portion which was represented to be susceptible of cultivation if cleared. From the facts stated, the jury had a right to find that, owing to the topography of this tract, its irregular shape, and the fact that it was covered with brush, the falsity of the representations relative to the number of acres could not readily be ascertained. There was no way for the prospective vendee to investigate the tract, or get such a view thereof as would enable him to form a reasonably accurate judgment as to the number of acres except by means of a scientific survey."

Under the doctrine of that case, if the respondents could not have readily ascertained the falsity of the representation as to the land in cultivation, they were justified in relying upon the statements made to them. In the present case the evidence shows that the land was irregular in shape, could not all be seen at one time from any elevated point, and that the number of acres under cultivation could not be readily ascertained except by means of a scientific survey. This is admitted by the defendants in their answer. The trial court, applying the rule of the *George* case, rightly denied the motion for a new trial.

It is further claimed that a motion for new trial should have been granted because of error in the in-

structions given and refusal to grant certain requests. The instructions given accurately state the law and cover the issues and the facts in the case. The instructions requested and refused, so far as they contained a correct statement of the law applicable to the case, were in substance given. There was no error growing out of the instructions either given or refused.

The judgment will be affirmed.

PARKER, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

[No. 16425. Department Two. September 30, 1921.]

MARIA E. POWERS, *Respondent*, v. WINFIELD S. POWERS *et al.*, *Appellants*.[1]

MARRIAGE (20, 21)—ANNULMENT—SCOPE OF RELIEF—PROPERTY RIGHTS. On annulment of a void marriage the court has power to award the wife real property standing in the name of the husband which had been acquired by their joint efforts while living together as husband and wife.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered December 28, 1920, upon findings in favor of the plaintiff, in an action to annul a marriage and for a division of property, tried to the court. Affirmed.

C. H. Baldwin and *S. O. Tannahill*, for appellants.

Homer L. Post, for respondent.

MAIN, J.—The purpose of this action was to annul a void marriage and have a portion of the property which the parties had acquired during the time that they were living together as husband and wife decreed to the plaintiff. The trial resulted in findings of fact,

[1]Reported in 200 Pac. 1080.

conclusions of law and a judgment annulling the marriage and decreeing certain property to the plaintiff. From this judgment, the defendant appeals.

The controversy here is over the property. There is no controversy, or at least there is no room for controversy, over the annulment of the void marriage. The facts as found by the trial court and which the evidence sustains may be summarized as follows: In the spring of 1900, in the state of Minnesota, the respondent and appellant entered into an agreement to live together as husband and wife, which would constitute a lawful marriage under the laws of that state if both parties were competent to marry, and continued to live together as husband and wife until the month of March, 1919. During all this time the appellant held the respondent out as his wife, introduced her as such, and the respondent believed herself to be his wife. The appellant had a wife living from whom he had not been divorced, but informed the respondent that a divorce had been had. At the time of the attempted marriage, the respondent believed that the appellant was competent to enter into that relation. The parties lived together as husband and wife for a few months in the state of Minnesota, then moved to the state of Montana, where they resided until the year 1901, when they moved to the state of Idaho, where they continued to reside until they removed to Asotin county, this state, in the month of July, 1917. During the time they were residing in the state of Idaho, the appellant filed upon a homestead of one hundred and sixty acres, made final proof thereon and received a patent therefor. The respondent filed a timber and stone claim upon approximately one hundred and forty acres of government land, made final proof thereon and received a patent therefor in her

own name. In the year 1917, both the homestead and the timber claim were sold and there was received therefor the sum of $4,800. Personal property to the amount of $1,500 was also sold. As a part consideration for the Idaho land, real estate in Asotin county which is now in controversy was taken.

In March, 1919, the appellant left the home in Asotin county to go to Rochester, Minnesota, for an operation, and while on this trip met the wife to whom he had been married prior to the time he assumed relations with the respondent, and resumed marital relations with her. In September, 1919, the appellant returned to Asotin county, informed the respondent that he had met his legal wife, that she had never been divorced from him, and that the respondent was not his wife. He also informed the respondent that the deed to the Asotin property was in his name and that she had no interest therein. At this time he made a lease of the Asotin property to the respondent which she accepted without knowledge of her rights. After this the appellant took all the money remaining from the sale of their properties and returned to live with the wife to whom he had been legally married.

There are a number of questions argued in the briefs, but it seems to us the decision of one of them is determinative of the action. The parties lived together as husband and wife, the respondent believing, in good faith, that they were such, and during this time the Idaho property was acquired. The timber claim belonged to the respondent and the homestead to the appellant. Both the real and personal property which the parties disposed of at the time they came to this state had been acquired by their joint efforts while they were living together as husband and wife though not legally married. Under the facts, the court had

the power in the action to annul the void marriage and to award to the respondent such portion of the property as she was equitably and justly entitled to. *Buckley v. Buckley,* 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900; *In re Brenchley's Estate,* 96 Wash. 223, 164 Pac. 913, L. R. A. 1917E 968; *Knoll v. Knoll,* 104 Wash. 110, 176 Pac. 22. The court did not err in awarding to the respondent the Asotin property.

The judgment will be affirmed.

PARKER, C. J., MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 16500. Department Two. September 30, 1921.]

HUB CLOTHING COMPANY, *Appellant,* v. THE CITY OF SEATTLE, *Respondent.*[1]

MUNICIPAL CORPORATIONS (473, 479)—TORTS—DEFECT IN WATER METER—ACTIONS—INSTRUCTIONS—BURDEN OF PROOF. In an action for damages for injuries resulting from the bursting of a water meter installed by defendant, it was error to refuse a requested instruction that, when plaintiff has shown a situation which could not have taken place except by the operation of abnormal causes, then the onus rests upon the defendant to prove that the injury was caused without his fault.

SAME (479)—ACTIONS—INSTRUCTIONS—DUTY OF INSPECTION. The refusal of the court, in instructing the jury as to the city's duty with respect to the inspection of its water meters, to define "reasonable inspection" as not confined to optical observation but as embracing tests and examinations, constituted error.

SAME (313)—ORDINANCES—PUBLIC HEALTH—BASEMENT DRAINS—REASONABLENESS—POLICE POWER. The ordinance of the city of Seattle relating to drainage of basements (No. 22,839 as amended by No. 36,792) is a proper exercise of the police power.

SAME (405)—TORTS—LIABILITY TO VIOLATOR OF ORDINANCE—EFFECT OF NONENFORCEMENT. The failure of a city to prosecute one for noncompliance with the terms of an ordinance relating to drainage of basements would not impose liability on the city for injury resulting from its nonenforcement.

[1]Reported in 201 Pac. 6.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 14, 1921, upon the verdict of a jury rendered in favor of the defendants, in an action for damages to property through the bursting of a water meter. Reversed.

Tucker & Hyland (Ford Q. Elvidge, of counsel), for appellant.

Walter F. Meier and *Edwin C. Ewing,* for respondent.

TOLMAN, J.—Appellant brought this action to recover from the respondent city damages alleged to have been sustained as a result of the bursting of a water meter installed by the city in the basement of the building occupied by it. The case was tried to a jury, which returned a verdict for the defendant, respondent here, and from a judgment on the verdict, the appellant brings the case here for review.

The defense interposed was that the city had exercised due care in the selection and maintenance of the meter, and also that the plaintiff had failed to comply with the city ordinance requiring all drains in basements used for business purposes to be protected by means of a raised strainer not less than one foot in height, so perforated as to admit the full flow of water into the sewer, and forbidding the occupation or use of a basement not so equipped.

Many errors are assigned, but we find it unnecessary to discuss each in detail.

There was evidence before the jury to the effect that the city bought this meter under a guarantee that it would withstand a pressure of three hundred pounds to the square inch. Before its installation it was subjected to a test of 120 pounds only; no other test or inspection being made. After its installation, the city

sent its employees monthly to read the meter and report anything wrong which they might see, such as leaks, breaks, loose nuts, couplings, and the like. Each meter reader was expected to read from three hundred to four hundred fifty meters each day, and it is apparent that there is room for a difference of opinion as to whether this was a sufficient inspection. Moreover, there was evidence introduced to the effect that this particular meter was defective in its construction, and there is ground for argument that the defect might have been discovered by a proper test or a proper inspection. The trial court instructed the jury that the burden of proof was upon the plaintiff to establish the specific negligence charged, but refused to go further and instruct as requested by appellant:

"You are instructed that, as a general proposition, the burden of showing negligence on the part of one occasioning an injury rests in the first instance upon the plaintiff, yet when it has shown a situation which could not have taken place except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was caused without his fault."

This instruction should have been given, as it properly defines the rule applicable in such a case, as we have frequently held. *Abrams v. Seattle,* 60 Wash. 356, 111 Pac. 168; *Vittucci Importing Co. v. Seattle,* 72 Wash. 192, 130 Pac. 109; *Briglio v. Holt & Jeffery,* 85 Wash. 155, 147 Pac. 877.

Error is also assigned upon the refusal of the trial court to define what was meant by the use of the words "reasonable inspection" used in instructing the jury as to the duty of the city. Appellant requested that the following be given:

"You are instructed that the word 'inspection' which I have heretofore used, is not confined to optical observation, but is ordinarily understood to embrace

tests and examinations; and it is defined by Webster as follows: 'to look upon, to examine for the purpose of determining quality and detecting what is wrong and the like.' "

This instruction should also have been given in order that the jury might have before it some standard by which to determine whether or not that which the city did amounted, under the circumstances of this case, to the performance of the duty which the law imposed.

The city, by its answer, pleaded its ordinance No. 22,839, as amended by ordinance No. 36,792, relating to the drainage of basements, and alleged that the plaintiff had failed to comply with the provisions of §§ 33 and 33½ thereof, and that the damages suffered by it, if any, were occasioned solely by such failure. The reply to this answer was a general denial only. Appellant now for the first time attacks the amended ordinance upon the theory that it is unconstitutional. Assuming, without deciding, that this question may now be raised, we are of the opinion that this ordinance must be upheld under the authority of *Schlumpf v. Seattle,* 88 Wash. 192, 152 Pac. 673.

Nor can the failure of the city to prosecute appellant for noncompliance with the terms of the ordinance affect the situation. *Fluckiger v. Seattle,* 103 Wash. 330, 174 Pac. 456, L. R. A. 1918F 780.

Because of the errors in refusing the instructions as herein pointed out, the judgment must be reversed and a new trial granted. It is so ordered.

PARKER, C. J., MITCHELL, and MACKINTOSH, JJ., concur.

[No. 16340. Department Two. October 1, 1921.]

L. G. GRAY *et al.*, *Respondents*, v. CLAUDE C. RAMSAY *et al.*, *Appellants*.[1]

EMINENT DOMAIN (62)—CONSTRUCTION IN HIGHWAY—ADDITIONAL SERVITUDE—DAMAGES—RIGHTS OF ABUTTING OWNERS. The construction of an open ditch ten feet in width along a public highway for the purpose of draining private property is an additional servitude for which the abutting owners are entitled to compensation, under art. 1, § 16, of the constitution prohibiting the taking or damaging of private property without first making just compensation.

ON REHEARING.

DRAINS (9)—PROCEEDINGS—DEFENSES—EFFECT OF INJUNCTION. A judgment enjoining a county from proceeding with the construction of a longitudinal drainage ditch along a highway on the ground that it would be an additional servitude necessitating condemnation does not preclude the county from proceeding to condemn a right of way for such ditch under the authority conferred by Laws 1921, ch. 160, § 3.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 18, 1920, in favor of the plaintiffs, in an action for an injunction, tried to the court. Affirmed.

Fred C. Brown, Malcolm Douglas, Howard A. Hanson, and *Bert C. Ross*, for appellants.

C. H. Winders, Joseph C. Sherman, and *Arthur E. Simon*, for respondents.

MAIN, J.—The plaintiffs brought this action to restrain the defendants, as commissioners of King county, from proceeding with the organization of a drainage district, the plans of which contemplated an open ditch in the highway upon which the property of the plaintiffs abutted. The trial court sustained the right to injunctive relief upon the ground that the

[1]Reported in 200 Pac. 1074; 204 Pac. 4.

commissioners had no right to construct in the highway a longitudinal ditch. From the judgment entered, the defendants appeal. By § 29, ch. 130, Laws of 1917, the right was given to construct drainage ditches and cross highways, and a provision was made for apportioning of the costs. There was no provision in this law for longitudinal ditches. After the case was tried and the appellants' opening and the respondents' answering briefs had been written, the legislature, at its 1921 session, in § 3, ch. 160, enacted

"That drainage ditches of any drainage improvement district heretofore or hereafter created, may be constructed and maintained along any public highway, street, alley or road within the limits of any drainage district."

The legislature, by that act, gives the right, so far as it had the power, to construct longitudinal ditches. The real question in the case is whether such a ditch as is here contemplated, when it is constructed, would be an additional burden or servitude upon the fee which, under the holdings of this court, is in the abutting property owner which is subject to an easement in the public. *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988.

The ditch which the appellants proposed to construct was approximately nine miles in length, open and unguarded, with an average width of ten feet and an average depth of five feet. Approximately five miles of the ditch, as contemplated by the specifications, would be constructed longitudinally in roads and streets upon which the property of the respondents abutted. Under the constitution, art. 1, § 16, private property cannot be taken or damaged for public or private use without just compensation having been

first made. The purpose of the ditch was to drain lands the title to which was in private ownership. If the construction of such a ditch upon the highway constitutes an additional burden and servitude upon the fee owned by the respondents, then it could not be constructed without first having acquired the right to do so by condemnation or otherwise. The question as to when the construction of drains or ditches in a highway for the purpose of reclaiming private property constitutes an additional burden is one of some difficulty. In 1 Elliott, Roads and Streets, § 486, it is said:

"Suburban roads may be used for public drainage purposes, that is, for draining other public ways. Whether they could be used without additional compensation to the owner of the fee for the purpose of constructing drains for reclaiming private property is a question of no little difficulty, even if such drains are a public benefit. We are inclined to the opinion that such a use cannot be made of them without compensation, for the only purpose for which they were set apart is that of a highway for travel, while the whole interest and profit in the land remains in the owner of the fee, subject only to easement of the public. The use of a way for the purpose of constructing drains, for other than legitimate highway purposes, cannot, as we believe, be justly considered as included in the public use to which the suburban way was set apart."

In *Moore v. Gar Creek Drainage District*, 266 Ill. 399, 107 N. E. 642, the commissioner of highways was proposing to permit a drainage district to excavate a ditch and lay tile in a highway to drain lands not within the highway but which were in private ownership. The abutting property owner objected, claiming, among other things, that such a drain would constitute an additional burden upon his fee. Upon this question the supreme court of Illinois there said:

"The laying of this tile in the public highway was an additional burden and servitude upon the fee. That the primary purpose of the improvement was not to benefit the highway but the adjoining lands is abundantly shown from the fact that benefits were assessed against the land of appellant for this improvement in the sum of $1,626.26."

In the *City of Houston v. Kleinecke*, 26 S. W. (Tex. Civ. App.) 250, the city constructed a canal or ditch in a street for the purpose of drainage, which, in effect, destroyed the street and deprived the abutting owners of access to their property. It was there held that such owners were entitled to damages because "the right to such compensation is secured by the constitution and cannot be taken away by the legislature."

Applying the doctrine of the authorities cited to the facts in the present case, it seems reasonably plain that the ditch proposed to be constructed would constitute an additional burden. It would carve out of the highway a zone of practically ten feet in width and cause that much of the highway to be devoted, not to the purposes for which it was created, but for the purpose of draining private property. It would seriously impede the ingress and egress of the abutting property owners. Under these facts it would hardly be doubted that the ditch would constitute an additional burden, and since it was not to be constructed for a street or highway purpose, the respondents had a right to prevent its construction until the damages which they would sustain thereby had been ascertained as required by the constitution. The appellants' authorities and argument on this point proceed on the theory that the principles applicable to drains and sewers are similar, and that, therefore, since it is the rule that sewers constructed in streets or alleys do not constitute an additional burden, it follows that an

open ditch upon a highway would not constitute an increased servitude. The analogy between the sewers and the open ditch is not sufficiently close to make the law applicable to the former controlling in the latter. A sewer is a drain which is covered and conceals the passage of its contents; it does not interfere with the use of the street nor impede the ingress or egress of the abutting property owner. The open ditch as proposed to be constructed in this case would interfere with the ingress and egress. It is unnecessary in this case to go so far as did the Illinois court. Whether the placing of a drain tile in a highway constitutes an additional burden will remain an open question in this state so far as this opinion is concerned—we do not decide that question. We only hold that the ditch here proposed, if constructed, would subject the fee of the abutting property owner to a material additional burden and servitude.

The judgment will be affirmed.

PARKER, C. J., TOLMAN, MACKINTOSH, and MITCHELL, JJ., concur.

ON REHEARING.

[*En Banc.* January 24, 1922.]

PER CURIAM.—In a petition for rehearing in this case, we are requested to modify the judgment wherein it enjoins the commissioners from taking further steps looking to the organization of the drainage district under the plans adopted for the construction thereof. The modification is not necessary. The trial court restrained the commissioners on the theory that the statute as it then was permitted only cross ditches and did not permit longitudinal ditches in the highway. After the entry of the judgment, and prior to the time the cause was heard here on appeal, the legislature passed an act which permitted the construction of

longitudinal ditches. The judgment of the trial court was sustained upon the theory that the longitudinal ditch proposed would cast an additional burden or servitude upon the abutting property and could not be constructed without first having condemned the right to do so. If the commissioners should proceed to organize the district for the purpose of condemning the right of way and thereafter constructing the ditch, it would be an unreasonable construction of the language of the judgment, read in the light of the opinion in this case, to hold that they were prohibited from going forward with the organization.

The petition for rehearing will be denied.

[No. 16661. *En Banc.* October 4, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Louis F. Hart et al., as State Finance Committee, Plaintiff*, v. C. W. CLAUSEN, *Respondent.*[1]

STATES (22, 25)—PUBLIC DEBT—SOLDIERS' BONUS ACT—ISSUANCE OF BONDS—AUTHORITY OF STATE BOARD—STATUTES—CONSTRUCTION. Under art. 8, § 2, of the state constitution authorizing the incurring of indebtedness, without any limitation, for conditions arising out of war, and Laws 1920, Ex. Sess., ch. 1, §§ 6, 7, which appropriate a definite sum derivable from a sale of state bonds, to pay equalized compensation for services in the European war, and further provides that, in case such sum be insufficient to pay the compensation allowed, additional bonds be issued and sold for the purpose, a definite appropriation of public money was made involving no delegation of legislative power, since the amount necessary is simply a mathematical proposition determinable from the public records.

Application filed in the supreme court August 16, 1921, for a writ of mandate to compel the state auditor

[1]Reported in 201 Pac. 30.

to issue warrants in payment for bonds issued under the veterans' compensation act. Granted.

The Attorney General, Fred J. Cunningham, Assistant, and *Nat U. Brown,* for relators.

John A. Frater, for respondent.

HOLCOMB, J.—The sole question in this case is whether or not ch. 1, Laws of 1920, p. 7, is sufficient authorization for the issuance of bonds of the state in excess of $11,000,000. The question arises by reason of § 6, p. 11, of the act, which contains the following provisions:

"For the purpose of providing means for the payment of compensation hereunder and for paying the expenses of administration there shall be issued and sold bonds of the State of Washington in the sum of Eleven Million Dollars ($11,000,000): *Provided,* That if the proceeds of the sale of such bonds be insufficient to pay the compensation herein allowed, then sufficient additional bonds to pay such compensation shall be issued and sold. The issuance, sale and retirement of said bonds shall be under the general supervision and control of the State Board of Finance."

Bonds to the amount of eleven million dollars have been issued and sold by the state and the funds derived therefrom have been practically exhausted in the payment of warrants. Additional bonds have been authorized and a block of them bid in by the finance committee as an investment for the permanent school fund. The state auditor has refused to issue warrants on the school fund in payment of the bonds, and this action is brought to compel him so to do.

The respondent predicates his position upon the ground that there is a constitutional inhibition against the action of the committee.

The first three sections of art. 8 of the state constitution which have to do with "public indebtedness" are as follows, to wit:

"§ 1. The state may, to meet casual deficits or failure in revenues or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars ($400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever.

"§2. In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, and to no other purpose whatever.

"§ 3. Except the debt specified in sections one and two of this article, no debts shall hereafter be contracted by or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people."

It is conceded that § 1, art. 8, has nothing to do with the question involved, but respondent contends that the petitioners can find no authority for their acts un-

der § 2, art. 8, and also contends that § 3, art. 8, prohibits the contracting of debts on behalf of the state unless they fall within the proviso of §§ 1 and 2, and draw particular attention to the following parts of § 3:

". . . which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, . . ."

Section 6 of the Veterans' Equalized Compensation act provides for the issuance and sale of eleven million dollars worth of bonds, and § 7 provides that the money arising from their sale be deposited in the state treasury to the credit of the special fund known as the Veterans' Compensation Fund. Section 7 also makes an appropriation of eleven million dollars, in the following language:

"For the purpose of carrying out the provisions of this act there is hereby appropriated from the Veterans' Compensation Fund the sum of eleven million dollars ($11,000,000)."

Section 8 of the act authorizes and directs the levy of a one mill tax for the purpose of creating a fund with which to retire the bonds and pay the interest thereon. Section 13 of the act directs its submission to the people for ratification at a general election.

Respondent therefore contends that a definite amount of money, eleven million dollars and no more, having been appropriated, and a definite millage tax provided for the purpose of retiring the authorized indebtedness created, and the act having been passed by the legislature having been legally referred to the

people for their ratification, and further, that the legislature of 1920-1921 reappropriated the exact amount of eleven million dollars, that petitioners are in effect seeking to incur a state indebtedness without a definite appropriation having been made therefor and without the authority of a legislative act properly referred to and approved by the people at a general election.

We have heretofore decided, in *State ex rel. Hart v. Clausen,* 113 Wash. 570, 194 Pac. 793, that the act in question is valid as a constitutional act in that it was for a public purpose. While § 2, art. 8, of the constitution of Washington was not particularly referred to as authority supporting the constitutionality of the law, it is manifest that when it was decided that the payment of the funds provided for by the Veterans' Compensation Act as being for a public purpose brought it within that section, and § 3, art. 8, having been conformed to, no other provision of the constitution stood in the way.

When the act was passed it was impossible to ascertain the exact number of veterans who would be entitled to the additional compensation or the exact amounts due to those entitled to it. Those matters, however, were matters of public record to be determined according to the records of the government of the United States, and when determined the amount necessary to be raised by the sale of bonds was possible to determine. It is a general rule that that is certain which is capable of being ascertained and made certain. The debt, therefore, is already contracted by the legislature.

Recalling that the proviso of § 6, ch. 1, Laws of 1920, is that "if the proceeds of the sale of such bonds be insufficient to pay the compensation herein allowed, then sufficient additional bonds to pay such compensa-

tion shall be issued and sold," the conclusion is irresistible that when it is found that eleven million dollars, the sum appropriated by the act, is not sufficient for the compensation of all the veterans entitled to the benefits of the act, it is clear that the state board, under that proviso, has power and is directed to issue bonds in a sufficient amount to provide for the compensation of all the veterans entitled thereto. The authorization is clear and unequivocal.

There is no limitation imposed upon the amount of debt that may be contracted for the purposes contemplated by subd. 2, art. 8, of the constitution. The legislature, the people approving at the referendum, contracted the indebtedness, and the evident intention of the legislature and the people was that every veteran entitled to the amount fixed by the act should be provided for. As was said by the supreme court of Minnesota in *Gustafson v. Rhinow,* 114 Minn. 415, 175 N. W. 903:

"No limitation is imposed upon the amount of debt that may be contracted for the purposes contemplated by section 7 of article 9 [Minnesota Constitution], nor is the evidence of such a debt restricted to any particular form. It seems to have been the purpose of the organic law to liberalize the application of this section in view of the vital character of the emergency it was designed to provide against. But such emergency is not to be considered the mere repelling of invasion or suppressing of insurrection in time of war, as we understand the appellant to contend. A public debt for a proper military purpose may be legally contracted in time of war, without reference to a state of invasion or insurrection. Conditions may exist, as recent history has shown, which call for active military operations of various kinds, though no hostile invasion be imminent or even probable. Such operations might require the borrowing of large sums of money, the amount of which would be dependent upon the exist-

ing circumstances, and could not, in the nature of things, be determined or limited in advance. *Franklin v. State Board of Examiners,* 23 Cal. 173, is directly in point. The constitution of California limited the state debt to $300,000, 'except in case of war, to repel invasion or suppress insurrection,' etc. By an act of April 27, 1863 (St. Cal. 1863, p. 662), entitled 'An Act for the relief of the enlisted men of the California Volunteers in the service of the United States,' the Legislature provided for the creation of a debt of $600,000 to be used in the payment of an additional $5.00 per month to enlisted men of the California Volunteers from the time of their entry into the service. The plaintiff entered service on November 25, 1861, and was discharged on July 25, 1863. The question was upon the constitutionality of the statute giving him $5.00 per month for the period of his service; and the statute was held authorized under the provision of the California Constitution identical for practical purposes with section 7 of article 9 of our Constitution. This case is not distinguishable from the one before us. See, also, *People v. Pacheco,* 27 Cal. 175; *Reis v. State,* 133 Cal. 593, 65 Pac. 1102; *State v. Stewart,* 54 Mont. 504, 171 Pac. 755, Ann. Cas. 1918D, 1101."

The authorities upon the right of the state generally to issue bonds and create indebtedness are of little assistance in this case.

"The different states of the Union in incurring indebtedness and issuing negotiable securities therefor, are subject to the specific limitations to be found in their several constitutions, either in respect to the amount to be issued or the purpose for which issued." Abbott, Public Securities, p. 157.

"Except as limited by constitutional provisions, the legislature has absolute control over the finances of the state; and its power as to the creation of indebtedness or the expenditure of state funds, or making appropriations is plenary, and the exercise of this power

cannot be controlled or reviewed by the courts." 36 Cyc. 882.

Having determined that the creation of the indebtedness involved in this act was valid under our constitutional limitations, we are confident that the proviso in § 6 of this act for the issuance of additional bonds, if the eleven million dollars authorized be found insufficient, is also valid. There is no delegation of legislative power in that proviso, but merely an authorization to ascertain that which may be made certain by public records, and to issue additional bonds upon such determination. There is no exercise of discretion involved. It is simply a mathematical proposition and a mandate to issue sufficient bonds to satisfy all the demands. The authority is clear.

With the question of whether or not the proceeds of additional bonds can be paid out of the state treasury under the appropriation limiting the amount of eleven million dollars, we have no present concern.

The writ of mandate will issue.

Parker, C. J., Tolman, Mitchell, Bridges, Main, Hovey, and Fullerton, JJ., concur.

[No. 16304. *En Banc.* October 6, 1921.]

In the Matter of the Estate of LEVI M. LANGILL. E. E. LANGILL, *Appellant,* v. BESSIE LANGILL STEWART *et al., Respondents.*[1]

EXECUTORS AND ADMINISTRATORS (8, 13)—APPOINTMENT—DISQUALIFICATIONS—STATUTES—CONSTRUCTION. In appointing an administrator of a decedent's estate the court acts judicially, and, if it finds that an applicant who has a prior right of appointment under the order prescribed by Laws 1917, ch. 156, § 61, is unfit to be trusted with the funds of the estate, the court is justified in denying his application for letters (PARKER, C. J., HOLCOMB, and MITCHELL, JJ., dissent).

Appeal from an order of the superior court for Pierce county, Chapman, J., entered July 14, 1920, denying petitioner's application for letters of administration, and appointing another as administrator of an estate, after a hearing before the court. Affirmed.

Walter M. Harvey, for appellant.

Guy E. Kelly and *Thomas MacMahon,* for respondents.

FULLERTON, J.—On May 22, 1920, Levi M. Langill died intestate in Pierce county, Washington, leaving an estate therein subject to administration. The appellant, E. E. Langill, within forty days after the death of Levi M. Langill, applied for letters of administration upon his estate. His application was opposed by other heirs of the estate, and, after a hearing, the court denied the application, appointing one Harris G. Ward as administrator of the estate. E. E. Langill appeals.

The evidence need not be detailed at length. The applicant admits a misuse of a part of the funds of the estate, and the evidence otherwise convinces us that

[1]Reported in 201 Pac. 28.

there is a grave probability that he has misappropriated another very considerable part. It shows, moreover, that his general character is such as to unfit him for the administration of any form of trust.

But the statute (Laws of 1917, ch. 156, p. 656, § 61) prescribes the order in which persons are respectively entitled to administer upon an estate, and elsewhere (§ 87, p. 663, Id.) prescribes who are disqualified to act. The evidence shows that the appellant is first in order of the enumerated persons entitled to appointment, and shows further that the disqualifications he was found to possess are not among the statutory disqualifications. The appellant contends that these provisions of the statute are mandatory; that the enumeration of certain disqualifications by the statute precludes the idea that other disqualifications may exist; and that, in determining who may be appointed as an executor or administrator, the courts are without power or right to adjudge a person disqualified on grounds which the statute does not make disqualifications.

We are unable to agree with these contentions. The statute, while it defines certain things as disqualifications, does not say in terms, nor do we think by necessary implication, that there shall be no other. The purpose of administration is to preserve the estate and cause it to pass to the heirs and distributees without waste or loss, and without undue delay. In appointing an administrator the court acts judicially, not ministerially, and it is as much its judicial duty to guard an estate against possible waste and loss as it is to take action against waste and loss after it has occurred. It is true that the right to administer an estate is a valuable right. But, to paraphrase the language of Mr. Justice Woods in *Ex parte Small*, 69 S. C. 43, 48 S. E. 40, no right is arbitrary or un-

qualified by a correlative right. The right of those interested to have an estate administered and distributed in accordance with law is the dominant right; the right of any particular person to administer the estate is a secondary right. When the allowance of the claim to exercise this secondary right may result in defeating the primary right, it should be refused.

It may be that our conclusion trenches upon the weight of judicial authority. But the cases, for the greater part, are based upon and follow the rigid rules of the common law. In this state, the administration of estates is wholly statutory, and we feel free to give the statutes that construction which in our judgment will best accord with their purpose and spirit.

The order is affirmed.

MAIN, BRIDGES, MACKINTOSH, and TOLMAN, JJ., concur.

HOLCOMB, J. (dissenting)—By the majority decision the disintegration of the probate code of 1917 is begun. Laws of 1917, ch. 156, p. 642.

The majority say: "The statute, while it defines certain things as disqualifications, does not say in terms, nor do we think by necessary implication, that there shall be no other." And in conclusion the majority say: "In this state, the administration of estates is wholly statutory, and we feel free to give the statutes that construction which in our judgment will best accord with their purpose and spirit."

This reasoning is wholly inconsistent and illogical. Furthermore it is not giving the statutes a construction to accord with their purpose and spirit. It is positively legislating and creating disqualifications which the statutes did not create.

It may be granted that appellant is not a very admirable character, and not such a person as any

court or judge would desire, if uncontrolled by statute, to grant any trust to; but we cannot disregard positive provisions of the probate statutes.

The record shows that appellant had used the sum of $150, according to his own admission, of the ready funds of the estate, after the death of his father, in making a visit to his sister, Emily Burchard, at Clinton, Iowa. He candidly admitted the use of this money; but as he would be compelled to give bond if appointed administrator, the provisions of the statute requiring him to fully account for all of the estate, the terms of his bond would be amply sufficient to protect the persons interested in the estate.

The record also shows that Emily Burchard, the only other eligible on a parity with appellant for appointment as administrator, while at first objecting to his appointment, afterwards withdrew her objection and prayed for his appointment, leaving no others objecting except grandchildren, who were fourth in the order of eligibles.

The record also shows that Charlotte Langill, the wife of decedent, and who shortly before the death of Levi M. Langill had been adjudged by the superior court, upon the certificates of two competent physicians, as insane, had shortly thereafter been pronounced sane. Upon her being adjudged insane, appellant was appointed guardian of her estate, and upon her discharge from custody, his appointment had been annulled and he had been ordered forthwith to report as guardian to the superior court. His attorney immediately moved to set aside the order discharging him as guardian, upon the ground that it was made without notice, and without any hearing, and without any testimony or evidence in support of the same, and that the court was without jurisdiction of the parties

or the subject-matter. He made no report as guardian up to the time of the hearing upon the petition for appointment of administrator. Upon the conclusion of the hearing on the appellant's petition for appointment of administrator, the court orally announced that nothing had been shown upon the hearing to show that appellant was not a fit and proper person, except that he had failed to report and account as guardian of the estate of Charlotte Langill, as directed by the superior court, and that his disobedience of such order was a very good indication that he ought not to be appointed administrator. It was adjudged, therefore, that appellant was not a fit and proper person to be appointed administrator. That is the only ground upon which the trial court refused to appoint him administrator, but the majority seem to find some other.

The probate code, Laws of 1917, p. 656, ch. 156, in § 61, provides:

"Administration of the estate of the person dying intestate shall be granted to some one or more of the persons hereinafter mentioned and they shall be respectively entitled to the following order: . . .

"Next of kin in the following order: 1, child or children; . . ."

Section 87 of the code provides:

"The following persons are not qualified to act as executors or administrators: Corporations, non-residents of this state, minors, persons of unsound mind, or who have been convicted of any felony or misdemeanor involving moral turpitude."

Appellant fell within none of the disqualified classes, and while he may have been guilty of a felony or of a misdemeanor involving moral turpitude, he had not been convicted thereof. Yet the majority say that, because the appearances are that he has been guilty of such an offense, although not convicted, and although

the statute specifies those who have been convicted of a felony or of a misdemeanor involving moral turpitude as being disqualified—they read into the statute that, if the court suspects that the applicant has been guilty of a felony or of a misdemeanor, etc., he shall not be appointed.

At common law, eligibility was the rule, and disqualification for the granting of administration the exception. Illiteracy, ignorance, interest in the estate, immorality, and even criminality were not regarded as disqualifications; but idiocy and insanity were.

"In the United States the right to letters of administration is generally regulated by statute, and more or less elaborate provisions are made by such laws determining the priorities of the various relatives of different degrees." 11 R. C. L., p. 34, § 22.

"Next after husband and wife the preference as to letters of administration is usually given under modern statutes to the next of kin, or to the nearest relative of the deceased. . . ." 11 R. C. L., p. 37, § 26.

"Even under statutes regulating the priorities of those entitled to administer, considerable discretion is given the court in determining who shall be appointed. Where the statute provides that the surviving spouse or next of kin, or both, as the court may determine, must be appointed, if suitable and competent to discharge the trust, it is for the court to determine whether such persons are incompetent or unsuitable. A statute, one section of which empowers a court to appoint as executors persons named in a will *if they are fit persons,* and a subsequent section of which *enumerates the persons who are not deemed fit,* vests in the court a discretion to determine the existence of the particular causes of disability enumerated, *but does not vest a broad discretion to determine what are causes of disability.*" 11 R. C. L., p. 42 (Italics ours).

It will be noted that our statute does not read as indicated in the text above, that certain persons must

be appointed *if suitable and competent to discharge the trust,* but does specify certain persons in certain order who shall be appointed, and the subsequent section specifies certain persons who shall be disqualified; and since at common law and in many of the states it is generally true that the moral fitness of a person to be appointed executor or administrator should not be inquired into by the court, and since our statute makes no such provision, but does make certain specific provisions disqualifying one from appointment, such moral qualifications are undoubtedly not required.

If courts having jurisdiction of probate matters can deviate from the order of eligibles as provided by statute in § 61, *supra,* and can find disqualifications not found in § 87, *supra,* the entire provisions are useless and ineffective, and the courts will be at liberty to appoint any person selected by them upon application for appointment of an administrator.

True, "the purpose of administration is to preserve the estate and cause it to pass to the heirs and distributees without waste or loss, and without undue delay;" but as to all those matters, those interested would be amply protected by good and sufficient bond.

The majority opinion is manifestly wrong and the order appealed from should be reversed.

PARKER, C. J., and MITCHELL, J., concur with HOLCOMB, J.

[No. 16330. Department One. October 6, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Great Northern Railway Company, Appellant,* v. F. R. HERSCHBERGER *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS (3-1)—PETITION TO INCORPORATE—PUBLICATION OF NOTICE—DESCRIPTION OF BOUNDARIES—STATUTES. A notice of hearing by the county commissioners upon a petition for the formation of a town, which fails to describe the boundaries as petitioned for is such a jurisdictional defect as to invalidate the proceedings for incorporation.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered August 12, 1920, in favor of the defendants, denying an application for a writ to review proceedings for the incorporation of a town, upon sustaining a motion to quash the writ. Reversed.

Charles S. Albert and *Ernest E. Sargeant (A. J. Laughon,* of counsel), for appellant.

W. C. Gresham, for respondents.

FULLERTON, J.—On December 1, 1919, certain electors of a portion of the county of Okanogan filed a petition with the board of county commissioners of that county, praying that a portion thereof be incorporated as a municipal corporation under the name of the town of Molson. The petition contained an accurate description of the boundaries of the proposed corporation, and was in other respects sufficiently regular. On the presentation of the petition, the board of county commissioners fixed January 6, 1920, at 10 o'clock a. m., in the rooms of the board in the courthouse at the city of Okanogan, as a time and place for hearing the petition, and directed that the

[1]Reported in 201 Pac. 2.

petition be published, together with a notice of the hearing, for at least two weeks preceding the hearing, in the Molson Leader, a newspaper printed and published in the county of Okanogan. An attempt was made to comply with the order of the board, but the petition as published, in describing the boundaries of the proposed corporation, did not follow the petition, but so described the boundaries as to exclude a considerable part of the territory which the boundaries as set forth in the petition included, even if the description can be said to be otherwise intelligible. The board of county commissioners found at the hearing, notwithstanding this defect in the publication, the proceedings to be in all respects regular, and submitted the question of incorporation to the electors of the proposed corporation, and thereafter, the election being favorable, entered an order declaring the territory as described in the original petition to be duly incorporated as a town of the fourth class, under the name and style of the town of Molson. The appellant now before us thereupon applied to the superior court of Okanogan county for a writ seeking a review of the several orders of the board of county commissioners. In its petition it set forth in substance the entire proceedings had with relation to the incorporation. The board, on its appearance in the proceeding, moved to quash the writ on the ground that the application did not state facts sufficient to constitute a cause of action, or grounds sufficient to entitle the applicant to the relief sought. The court sustained the motion, and after the applicant had elected to stand on its petition, entered a judgment of dismissal.

The single question presented here is whether the failure of the published notice to correctly describe the boundaries of the proposed corporation is fatal to the proceedings. It is our conclusion that it is so. The

publication of the petition, together with notice of the time of the hearing therein, is the jurisdictional process by which the persons affected by the incorporation are brought into the proceedings. The requirement that such publication be made is the positive mandate of the statute. The object of the requirement is to give persons affected by the proposed corporation an opportunity to appear and oppose or favor the incorporation as they may deem their interests require, and manifestly this right is denied them unless they be given notice of the true boundaries of the proposed corporation. No question with respect to the forming of a municipal corporation is more important to the property holder than the question of its boundaries. It is conceivable that a property holder may have no objection to the incorporation if it included only the territory described in the notice given him, while he would seriously oppose it if it included less or different territory. To say, therefore, that a notice need not describe the territory is not only to deny the mandate of the statute, but it is to open the doors to opportunity for fraud.

No principle of law is better settled than the principle that notice must be given of the organization of a municipal corporation in the form prescribed by statute. Abbott, in his work on Municipal Corporations, p. 34, uses this language:

"It is a fundamental rule of law that before action or proceedings of any character can be legally taken affecting the rights, either property or political, of an individual, he must have notice of the pendency of such proposed action or proceedings. This rule of law applies to the present question. A proposed municipal or quasi public corporation necessarily includes the property of a large number of individuals. The law gives them a right to be heard upon all matters pertaining to or affecting their rights. The

necessary petition preliminary to the organization of a public corporation, under authority of law, must be brought home either by actual or constructive notice to the attention of all possessing rights within the limits of the territory included."

So this court, in *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, said:

"There are few, if any, acts of state bearing upon individuals more important than those which determine their liability to be included in particular municipalities; and the cases are rare in which they have not been allowed an opportunity of being heard in every step of the proceedings."

In *State ex rel. Blum v. Port of Bayocean*, 65 Ore. 506, 133 Pac. 85, the question was on the sufficiency of an election notice held to determine whether a port should be organized. The statute required the description of the territory proposed to be included therein to be published in the notice of the election. In the description a call of a course was omitted, and the question was whether this invalidated the proceedings. The court said:

"We do not believe the notice of election sufficiently describes the exterior boundaries of the proposed port. The omission of one call from the description of the boundary leaves a hiatus to be supplied by the imagination of the person reading the notice. A defective description of a boundary in a deed may be corrected by a suit to have it reformed according to the true intent of the parties, but a misdescription in an election notice cannot be corrected nor reformed by any sort of proceeding. It must be absolutely definite in itself. This notice lacks that quality, and the proceeding is void."

But the authorities need not be multiplied. They are in substantial accord on the proposition that the notice is jurisdictional and must be complied with if the proceedings are to have validity.

The judgment is reversed, and the cause remanded with instructions to reinstate the case and proceed in accordance with the prayer of the petition.

PARKER, C. J., HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16451. Department One. October 6, 1921.]

KATIE HANAN *et al., Respondents,* v. THE CITY OF WENATCHEE, *Appellant.*[1]

MUNICIPAL CORPORATIONS (566)—CLAIMS—DESCRIPTION OF DEFECT—SUFFICIENCY. A claim against a municipality for personal injuries describing the place and cause of injury as a "defective sidewalk located on the northerly side of Yakima street about 80 feet westerly of the intersection of Yakima street with Oregon street" is insufficient, in view of Rem. Code, § 7998, requiring that such claim "must accurately locate and describe the defect that caused the injury."

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered October 8, 1920, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a defective sidewalk. Reversed.

D. A. Shiner, for appellant.

Barrows & Hanna, for respondents.

FULLERTON, J.—On July 19, 1919, the respondent Katie Hanan, while walking upon a sidewalk in the city of Wenatchee, fell thereon and was injured. Conceiving that the city was liable for her injury, she presented to the city, on August 14, 1919, a claim for damages in the following form:

"Katie Hanan, claimant, hereby presents and files her claim for damages against the city of Wenatchee for personal injuries caused by defective sidewalk located on the northerly side of Yakima street about

[1]Reported in 201 Pac. 5.

80 feet westerly of the intersection of Yakima street with Oregon street, which injury consisting of wounding, straining, bruising and injuring claimant's right leg, and other bodily injuries, which injury occurred on the 19th day of July, 1919. Claimant's residence for six months last past has been No. 522 Yakima street, Wenatchee, Chelan county, Washington; for which personal injuries aforesaid claimant claims damages for the sum of.....$5,000.00
and expense of medical attention, physician's services, and nursing heretofore incurred and prospective..... 500.00

"Total.....$5,500.00"

The city in due time rejected the claim, and later the respondent began the present action to recover for the damages suffered. At the trial, judgment went for the respondent, and the city appeals. At appropriate times during the course of the trial, both before and after the return of the verdict, the appellant questioned the sufficiency of the evidence to sustain a recovery. The objections were directed particularly to the sufficiency of the notice of claim presented to the city. It is objected that it does not accurately locate and describe the defect that caused the injury; in fact, does not describe the defect at all. This is the principal question presented on the appeal, and is the only question we have found it necessary to notice.

The requirement that a claim for damages against a city must be presented to the city council of the city for rejection or allowance, as a condition precedent to the maintenance of an action against a city, is statutory. The legislature has seen fit to prescribe, Rem. Code, § 7998 (P. C. § 665), that:

"All claims for damages against any city or town of the second, third or fourth class must be presented to the city or town council and filed with the city or town clerk within thirty days after the time when such

claim for damages accrued; . . . No ordinance or resolution shall be passed allowing such claim or any part thereof, or appropriating any money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department or committee, nor until such department or committee has made its report to the council thereon pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, reasonably describe the injury and state the time when the same occurred, give the residence for six months last past of claimant, contain the items of damages claimed and be sworn to by the claimant or a relative, attorney or agent of the claimant. No action shall be maintained against any such city or town for any claim for damages until the same has been presented to the council and sixty days have elapsed after such presentation."

Requirements of this sort in statutes and ordinances are constitutional, reasonable, and in the furtherance of justice. *Cole v. Seattle,* 64 Wash. 1, 116 Pac. 257, Ann. Cas. 1913A 344, 34 L. R. A. (N. S.) 1166. They are also mandatory; and a substantial compliance with the conditions imposed is a condition precedent to the maintenance of an action against a municipality. *Collins v. Spokane,* 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840.

Turning to the claim here in question, it seems to us to be at once apparent that there is no description of the defect which caused the injury. The recital is that the injury was caused "by defective sidewalk located on the northerly side" of a named street. This is not to accurately describe a defect; it is but to state a general ground on which a recovery can be predicated. Plainly, therefore, there was no compliance with the technical requirement of the statute. We think, furthermore, there was not a compliance with the purposes and

intent of the statute. Statutes of this sort have a number of purposes. One of these is to give the municipal officers notice of the nature of the defect which caused the injury on which the claim for damages is founded, in order that they may pay or otherwise settle the claim before the municipality is mulct in costs. This right is denied them unless the particular defect is pointed out to them. It is a matter of common knowledge that many of the sidewalks in municipalities are defective in some respects—in fact, it is common knowledge that few, if any of them, are perfect. Not all of these defects, however, will give rise to a cause of action, even though they cause an injury. To say, therefore, that a sidewalk is defective at a particular place and that the defect caused an injury, without anything more, does not give the city that information the law contemplates it should have before suit is instituted against it.

The notice in question here is wholly insufficient, and the trial court should have sustained some one of the numerous challenges interposed to its sufficiency. The judgment is reversed, and the cause remanded with instruction to enter a judgment in favor of the defendant to the effect that the plaintiff take nothing by her action.

PARKER, C. J., HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

[No. 16450. Department Two. October 6, 1921.]

SUMNER K. PRESCOTT COMPANY, *Respondent*, v. FRANKLIN TOOL WORKS *et al.*, *Defendants*, HENRY W. SUMNER *et al.*, *Appellants*, UNION NATIONAL BANK OF SEATTLE, *Respondent*.[1]

SALES (92)—CONTRACT—GOODS TO BE MANUFACTURED—TRANSFER OF TITLE. The general rule that no title vests in the purchaser under a contract for the manufacture of an article not existing in specie at the time of making the contract is not altered by the fact that the purchaser has a right to inspect all material and pass upon workmanship before installation, or is required to make payments as the work progresses, or that provision is made for a lien in favor of the manufacturer in the event of default in final payment for the article.

LIENS (5)—CHATTEL LIENS—RIGHT TO LIEN—ASSIGNMENT OF DEBT OR CLAIM. A corporation which has a contract for the manufacture of machinery parts has a right of lien thereon, though the actual work is done by a closely affiliated corporation, where there was no transfer of the contract by assignment or novation.

NOVATION (2)—NATURE AND ELEMENTS—SUBSTITUTION OF OBLIGATION BETWEEN SAME PARTIES. Novation is a contractual relation based upon a new contract by all the parties interested, and must be founded upon mutual agreement, proper consideration and a valid prior obligation to be displaced.

LIENS (5)—CHATTEL LIENS—RIGHT TO LIEN—POSSESSION OF PROPERTY. Under Laws 1917, p. 229, one furnishing material to be used in the construction of an article is entitled to a lien on the manufactured article, though he never had possession of the latter.

SAME (5)—PROCEEDINGS TO PERFECT—NOTICE OF LIEN—TIME FOR FILING. Under Laws 1917, p. 229, § 2, providing that lien claims for work or materials on chattels must be filed "within sixty days from the date of delivery of such chattel to the owner," the date of last delivery of material fixes the time for beginning of the running of the period of limitation.

SAME (6)—ENFORCEMENT—DEFENSE—PAYMENT—EVIDENCE. The fact that one liable for the cost of castings for an engine accepted a trade acceptance which was not paid would not operate as a pay-

[1]Reported in 201 Pac. 308.

ment of the debt nor defeat the right of foreclosure of a chattel lien.

ASSIGNMENTS (22)—MONEY DUE OR TO BECOME DUE—CONTRACTS—RIGHTS AND LIABILITIES. The assignment of money due or to become due under a contract is not an assignment of the contract which would bind the assignee to perform it.

PAYMENT (11, 32)—APPLICATION—VOLUNTARY PAYMENT—RIGHT OF RECOVERY—EFFECT OF ASSIGNMENTS FOR SECURITY. Money voluntarily paid to a bank to be applied by it to a labor and material account due under a contract between the payor and the manufacturer of machinery would not render the bank liable to the payor for a misapplication of part of the money to other indebtedness owed by the manufacturer to the bank, as in legal effect the payment in the first instance amounted to a payment to the manufacturer.

BANKS AND BANKING (25)—RIGHTS AND LIABILITIES AS BETWEEN BANKS—NEGLIGENCE. Negligence of a bank in handling a trade acceptance will not support an action in favor of one to whom the bank owed no duty respecting the instrument.

Appeal from a judgment of the superior court for King county, Smith, J., entered November 10, 1920, in favor of the plaintiff, in an action to recover a money judgment and to foreclose a chattel lien, tried to the court. Affirmed.

John B. Hart and *F. C. Kapp*, for appellants.

Donworth, Todd & Higgins, for respondent Union National Bank.

Gates & Helsell, for respondent Sumner K. Prescott Company.

Shorett, McLaren & Shorett, for defendants Franklin Tool Works.

MAIN, J.—The primary purpose of this action was to recover a money judgment and to foreclose a chattel lien. After the action had been instituted, upon the motion of the defendants Henry W. Sumner and Albert E. Parker, copartners doing business under the firm name of H. W. Sumner Company, the Union National Bank was made a party, and the issues made between

the bank and the Sumner company were also determined in the action. The trial resulted in a money judgment and a direction that the lien be foreclosed, and in the dismissal of the cross-complaint filed by the Sumner company against the bank. The Sumner company appeals. The preliminary facts essential to be stated are as follows:

Sumner K. Prescott Company is a corporation organized under the laws of this state. The Franklin Tool Works is also a corporation organized under the laws of this state. The Union National Bank is a corporation engaged in the banking business. As already stated, Henry W. Sumner and Albert E. Parker were copartners doing business under the name of H. W. Sumner Company. The Prescott company were engaged in the business of manufacturing machinery, castings, and so forth. The Franklin Tool Works was engaged in the business of constructing engines. The Sumner company was engaged in the business of having engines manufactured for sale. On the 15th day of January, 1919, the Sumner company entered into a written contract with the tool works company whereby the latter company agreed to build and deliver on board the cars, packed for export, two heavy marine oil burning engines. On March 10, 1919, the tool works company entered into a contract with Sumner K. Prescott Company whereby the latter company agreed to furnish iron castings necessary to the construction of the engines. After these contracts were entered into, the parties entered upon their performance. The Union National Bank was loaning money to the tool works company in order that it might carry on its enterprise, and took from that company a written assignment of all the monies due under the contract as the payments should be made from time to time. This assignment was accepted by the Sumner company. The contract

between the Sumner company and the tool works provided that, on the tenth day of each month, the latter company should be paid a sum equal to the amount of the labor payroll expended by that company on the engines during the preceding month, exclusive of any overhead charges, upon the presentation to the Sumner company of properly verified copies of the payroll, and further provided that a sum equal to seventy-five per cent of the amount expended for material should be paid at the same time. In carrying this out the method of procedure was for the tool works company to deliver to the bank copies of the payroll and duplicate invoices for material furnished during the preceding month, and the bank in turn presented these, together with an assignment thereof, to the Sumner company and that company made payment directly to the bank. The business proceeded in this way until the tool works company, in the month of July or August, 1919, became financially embarrassed and a trustee in bankruptcy was appointed, who for a time continued to operate the plant and carry on the work of manufacturing the engines. After a time, under an order from the Federal court, the plant was turned over to the Sumner company and they completed the work upon the engines. The Prescott company not being fully paid for the castings which it had furnished, filed a notice of lien, and, as above stated, one of the purposes of this action was to foreclose thereon. Other facts will be stated in connection with the points to which they may be particularly pertinent.

The first question to be determined is, was the title to the engines, during the time they were being constructed under the contract between the Sumner company and the tool works company, in the former or in the latter. It is the contention of the appellant that the title was in the Sumner company. The contract pro-

vided that the Franklin Tool Works agreed "to build, assemble, test and deliver on board the cars, packed for export, at its plant in the city of Seattle, county of King, and state of Washington, two H. W. Sumner Company, marine type heavy oil burning engines of six hundred shaft horse power each . . ." The contract further provided that the Sumner company had the right to inspect the building and construction of the engines. Where a contract is made for the manufacture of an article not existing in specie at the time of the making of the contract, the general rule is that no title vests in the purchaser during the progress of the work, nor until the chattel is finished and delivered, or, at least, is ready for delivery, or by some act is appropriated to the buyer. The text of Mechem, Sales, vol. 1, p. 630, states the rule as follows:

"The question of the time when the title will pass to goods which have been ordered to be manufactured is involved in some little conflict of decision, though the decided tendency of the authorities in the United States is clear. Under a contract for the manufacture of an article, as for the building of a ship or the construction of any other chattel, not existing in specie at the time of making the contract, it is the general rule that no title vests in the purchaser during the progress of the work, nor until the chattel is finished and delivered, or, at least, is ready for delivery, and, by tender or other equivalent act, is appropriated to the buyer."

This court, in *North Pacific Lumber & Mfg. Co. v. Kerron*, 5 Wash. 214, 31 Pac. 595, has adopted substantially the same rule. The appellant seeks to take the present case out of the rule by reason of the fact that the Sumner company, under the contract, had a right to inspect all material before installation and pass upon all workmanship, and the further fact that the contract provided for payments as the work progressed. The fact that the Sumner company had the

right of inspection and was required to make payments as the work progressed did not conclusively establish that the title passed to the Sumner company. *Andrews v. Durant,* 11 N. Y. 35, 62 Am. Dec. 55; *Clarkson v. Stevens,* 106 U. S. 505. They are circumstances to be taken into consideration in determining what the parties intended by the language in their contract. It is also said that since the contract provides that, in the event default is made in the final payment for the engines for a period of ninety days after they are ready to be delivered, the tool works company shall be entitled to a lien for the unpaid portion of the indebtedness, that this shows an intention that title should be in the Sumner company. The final payment was due when the engines were delivered properly packed for export, as provided in the preceding paragraph of the contract which is above quoted. As we read this portion of the contract, it is nothing more than providing that the Sumner company shall have a right to a lien after the engines have been completed, properly packed and delivered. Prior to that time there is no provision in the contract covering the matter of liens. There is nothing in the contract or in the evidence which would take the case out of the general rule stated by Mechem, to the effect that the title, during the period of construction, is in the manufacturer.

The title being in the tool works company, the appellant further contends that the Prescott company had no right to maintain an action to foreclose the liens, because it is claimed that all rights under the castings contract were transferred by assignment or novation from the Prescott company to the American Foundry Company, and if any right to a lien exists it is in the latter company. The Prescott company and the American Foundry Company were closely affiliated. Sumner K. Prescott owned all the stock in the Prescott com-

pany, with the exception of one share; he owned seventy-five per cent of the stock in the American Foundry Company. The business of the two companies was conducted from the same offices. It was the practice, when orders came in, to send them to the factory, where the articles required could be manufactured promptly. In this case the castings were in fact manufactured by the American Foundry Company and were billed direct by that company to the tool works company. In this way it saved double entry on the books, as would be required if the American Foundry Company had delivered to the Prescott company and that company in turn to the tool works company. There was no assignment of the contract, or pretense of assignment, from the Prescott company to the American Foundry Company. At all times the Prescott company was under obligations to fulfill the terms of the contract which it had entered into, and were the Sumner company seeking recovery upon the contract, there is no way by which it could maintain an action thereon against the foundry company. The contract was not transferred by assignment or novation from the Prescott company to the American Foundry Company. A novation is a new contractual relation. It is based upon a new contract by all the parties interested. It must have the necessary parties to the contract, a valid prior obligation to be displaced and proper consideration, and a mutual agreement, as was pointed out in the cases of *Sutter v. Moore Inv. Co.*, 30 Wash. 333, 70 Pac. 746, and *Osburn v. Dolan*, 7 Wash. 62, 34 Pac. 433. The fact that the castings were actually made in the American Foundry Company's plant and delivered by it direct to the Sumner company did not defeat a right of the Prescott company to proceed upon its contract and foreclose the lien.

It is next claimed that the Prescott company's lien must fail because it never had possession of the engines. It is argued that the lien statute (Laws of 1917, p. 229) is not broader than the common law rule, and to enforce a lien for work done upon a chattel, possession was a necessary prerequisite. The statute provides, § 1 thereof,

"Every person, firm or corporation who shall have performed labor or furnished material in the construction or repair of any chattel at the request of its owner, shall have a lien upon such chattel for such labor performed or material furnished, notwithstanding the fact that such chattel be surrendered to the owner thereof."

The statute, as we view it, is broader than the common law and gives the right to one furnishing material to a lien, even though such material be not in possession of the manufacturer. Under the statute, the Prescott company, even though it did not have possession of the engines, had a lien for the balance owing to it.

It is next contended that the notice of the claim of lien was not filed within the time required by law. Section 2 of the lien statute, Laws of 1917, p. 229, provides that, in order to make such lien effectual, the lien claimants shall, "within 60 days from the date of delivery of such chattel to the owner," file in the office of the county auditor a lien notice. The last delivery of castings under the contract was made by the Prescott company on July 19, 1919, and the lien notice was filed on September 15, 1919, which was within the sixty-day period. The appellant argues, however, that there could be no lien under the terms of the statute, if the tool works company were the owner, unless the lien notice was filed "within 60 days after the construction of the engines commenced." The notice of lien was filed within the time required by law.

Finally, upon this branch of the case it is contended that the amount of the judgment should be materially reduced. It is claimed that certain of the castings furnished were defective and that the tool works company was required to do a considerable amount of work in putting them in proper condition to be used; and second, that there should be a material reduction on account of a trade acceptance. As to the work having been done on the castings necessary to fit them for use, the evidence, without reviewing it in detail, is too indefinite to enable the court to hold that an offset of this character should be allowed. The Prescott company at all times was ready to take back any castings that were defective, and had so notified the tool works company.

The other matter on which a reduction was claimed was that of a trade acceptance. On June 16, 1919, the American Foundry Company drew a trade acceptance for $4,487, which was presented to the Franklin Tool Works and accepted by that company and made payable at the Georgetown branch of the Union National Bank. This was deposited in the Seattle National Bank on July 3, 1919, and credit was given therefor. It was payable twenty days after date. The due date was July 7, the preceding day being a Sunday. When the trade acceptance reached the Georgetown branch of the Union National Bank there were not sufficient funds of the tool works company to cover it, and it was returned to the Seattle National Bank and that bank charged back to the depositor, with the consent and approval of Mr. Prescott, the amount thereof. Prescott also testified that the trade acceptance was delivered to the Seattle National Bank for collection. Its right to charge back cannot be doubted. The trade acceptance, not having been paid, did not operate as a payment of the debt nor defeat the right of foreclosure. 27

Cyc. 270; *German Bank v. Schloth,* 59 Iowa 316, 13 N. W. 314; 18 R. C. L. p. 970.

We will now take up the consideration of the case between the Sumner company and the Union National Bank. By its cross-complaint, the Sumner company sought to recover against the bank monies which it had paid thereto and which it is claimed were not applied upon the indebtedness of the tool works company which was created in the manufacture of the engines. It is also claimed that it was the duty of the bank, before presenting the payrolls to the Sumner company, to see that the payrolls had been paid. The bank did not take an assignment of the contract, but only "all monies due or to become due under the terms" thereof. The assignment of money due or to become due under an executory contract is not an assignment of the contract and the assignee is not bound to perform it. *Lunt v. Lorscheider,* 285 Ill. 589, 121 N. E. 237; *Butler v. San Francisco Gas and Elec. Co.,* 168 Cal. 32, 141 Pac. 818; *National Surety Co. v. Maag,* 43 Ind. App. 16, 86 N. E. 862. Under the assignment, the bank owed no duty to the Sumner company to see that the money which was received from that company was properly applied upon the payroll by the tool works company. The bank took the assignment of the monies due on the contract merely as security for the advancement that it was making the tool works company.

It is further claimed that the bank applied certain of the money upon the indebtedness which the Franklin company owed it other than that contracted by the latter company in the manufacture of the engines in question. Even if this were the fact, the Sumner company would not have a right to recover from the bank. That company paid the money voluntarily, and the case stood very much as though the money had been paid by the Sumner company to the tool works company and that

company in turn having made payment to the bank. If this had been the procedure it would hardly be contended that the Sumner company had any right of action against the bank. In legal effect, this was the transaction. *Winslow v. Anderson,* 78 N. H. 478, 102 Atl. 310; *Merchants' Insurance Co. v. Abbott,* 131 Mass. 397. In the last case, speaking of a similar situation, it is said:

"The case stands just as if the money had been paid by the plaintiffs to Abbott, and by Abbott to these defendants, in which case there could be no doubt that, while the plaintiffs could recover back the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants. The fact that the money, instead of being paid by the plaintiffs to Abbott, and by Abbott to these defendants, was paid directly by the plaintiffs to these defendants, does not make any difference in the rights of the parties. The two forms do not differ in substance. In either case, Abbott alone is liable to the plaintiffs, and these defendants hold no money which *ex aequo et bono* they are bound to return either to Abbott or to the plaintiffs."

It is also claimed that recovery should be against the bank because the Georgetown branch thereof, at which the trade acceptance was made payable, did not promptly return it to the Seattle National Bank. The trade acceptance was received by the Georgetown branch one day after its due date, or the 8th of July, and was returned on the twelfth. What the effect of holding the trade acceptance for the time mentioned would have been if a party to the instrument were suing, it is not necessary here to determine. The trade acceptance was drawn by the American Foundry Company and accepted by the Franklin Tool Works. The Sumner company was not a party to it and, so far as the bank was concerned, was not known in the transaction. The bank owed no duty to the Sumner company arising out

of the trade acceptance. If it owed no duty it would not be guilty of negligence, but if it owed a duty but did not owe it to the Sumner company that company could not maintain an action. *Savings Bank v. Ward*, 100 U. S. 195. Upon this question, in Shearman & Redfield, Law of Negligence (6th ed.), vol. 1, § 8, it is said, with reference to duty as an essential element of negligence:

"The first element of our definition is a duty. If there is no duty, there can be no negligence. If the defendant owed a duty, but did not owe it to the plaintiff, the action will not lie. And there can be no duty to do any act which one has no legal right to do. The plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him."

There are two or three minor questions discussed in the briefs and which have not been mentioned in this opinion. They have been considered and we do not deem them to possess substantial merit. To discuss them here in detail would seem to unnecessarily prolong this opinion.

The judgment will be affirmed.

PARKER, C. J., TOLMAN, MITCHELL, and HOLCOMB, JJ., concur.

[No. 16401. Department Two. October 6, 1921.]

THE STATE OF WASHINGTON, *Respondent*, v. MATT PASSILA *et al.*, *Appellants*.[1]

CRIMINAL LAW (183)—EVIDENCE—IDENTITY OF ACCUSED. In a prosecution of foreign born persons for criminal syndicalism, confusion as to how their last names are spelled is immaterial, where their first names are sufficiently clear, and they were identified before the jury as the parties charged.

CRIMINAL LAW (137)—EVIDENCE—HEARSAY—DECLARATIONS BY THIRD PERSONS. Where testimony concerning the purposes, objects, principles, and teachings of the I. W. W. organization is limited to the acts and sayings of organizers or delegates at recognized meetings or places of assemblage of the organization, upon occasions sanctioned or directed by it, the evidence is not open to the objection of being hearsay.

SAME (182)—EVIDENCE—SUFFICIENCY—PLACE OF COMMISSION OF OFFENSE AND VENUE. Prosecution for criminal syndicalism may properly be maintained in the county of defendant's residence, though he was arrested while temporarily at work in another county.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered April 14, 1920, upon a trial and conviction of criminal syndicalism. Affirmed.

George F. Vanderveer, Ralph S. Pierce, and *F. D. Couden,* for appellants.

Herman Murray, for respondent.

MITCHELL, J.—Matt Passila, Emil Gustofson, Elmer Pulkkinen, John Hill, John Nauha, Otto Pykkenen, and Sam Jaffe were tried jointly in the superior court of Pacific county on an information charging them with the crime of criminal syndicalism. With few exceptions, to be further noticed herein, their many assignments of error fall within the rule of, and are con-

[1]Reported in 201 Pac. 295.

trolled by, *State v. Hennessy,* 114 Wash. 351, 195 Pac. 211.

Some claim is made of mistaken identity on part of appellants Matt (Gossilla) Passilla, Elmer (Golkkinen) Pulkkinen, and John (Nauka) Nauha, and that they should have been discharged. This matter was properly considered at the time of arraignment and settled as best it could be, even with an interpreter, considering the difficult names and the foreign accent of the individuals. They were identified before the jury as the parties in mind. In passing on their separate motions to be dismissed from the case, the trial court said:

"The first names are sufficiently clear, but there may be some confusion as to how their last names are spelled. They are foreign names, but I do not think there is anything serious in this matter, or anything that is prejudicial to them."

The record altogether satisfies us their motions to dismiss were properly denied.

Very considerable complaint is made of alleged errors relating to the subject of declarations, assertions and the conduct of certain persons, as testified to by witnesses at the trial, concerning the purposes, objects, principles and teachings of the I. W. W. organization, of which all the appellants were members. The objection is that it was in the nature of hearsay, was damaging, and hence prejudicial. But the record is apparently clear that the trial judge limited the testimony to those things and sayings done and made by organizers or so-called delegates of the organization at recognized meetings or assemblage places of the organization, and on occasions which were sanctioned or directed by it. In this respect the case falls within the rule of evidence announced in the very re-

cent case of *State v. Pettilla,* 116 Wash. 589, 200 Pac. 332.

It is claimed on behalf of the appellants Pulkkinen and Hill that, as they were arrested at Siler's Camp and the evidence fails to satisfactorily show that the camp was in Pacific county, therefore the superior court of that county was without jurisdiction. There is ample evidence, however, to show that they were only temporarily at the camp and that the residence of each was, and for several years had been, at Raymond, Pacific county. The situation in this respect is similar on principle and in detail to that in the action of *State v. Hestings,* 115 Wash. 19, 196 Pac. 13, which is decisive against this assignment of error.

Affirmed.

PARKER, C. J., TOLMAN, MAIN, and BRIDGES, JJ., concur.

[No. 16317. Department One. October 6, 1921.]

NATIONAL FINANCE COMPANY, *Appellant,* v. L. D. EMERSON, *Respondent.*[1]

NEW TRIAL (22)—GROUNDS—SUFFICIENCY OF EVIDENCE. In an action on promissory notes where the only defense is want of consideration, it is error for the court to grant a new trial after verdict for plaintiff, where the evidence shows plaintiff is a holder in due course.

BILLS AND NOTES (97, 98)—SALES (127)—ACTIONS—DEFENSES—WANT OF CONSIDERATION. Loss of goods after delivery by seller to carrier will not sustain a defense of want of consideration for notes given for the purchase price.

EVIDENCE (158)—TO VARY WRITING—EXISTENCE OF CONDITION. In an action on notes given for the purchase price of goods, evidence that the seller orally agreed as a part of the order to make shipment in time for the Christmas trade was inadmissible as tending to vary the written agreement, and also because not accompanied by an offer to show that a loss was suffered thereby.

[1]Reported in 201 Pac. 4.

Appeal from an order of the superior court for Adams county, Truax, J., entered December 13, 1920, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action on promissory notes. Reversed.

Adams & Miller, for appellant.

Wm. O. Lewis, for respondent.

PER CURIAM.—This was an action brought to recover upon three promissory notes executed and delivered by the respondent to the Ramona Trading & Manufacturing Company and by that company indorsed to the appellant before maturity. The defense set up was want of consideration. On the trial, at the conclusion of all of the evidence, the court instructed a verdict for the appellant. Thereafter, on motion of the respondent, a new trial was granted, and the present appeal is from the order granting a new trial.

It is our opinion that the court was in error in granting a new trial. The evidence on the part of the appellant supported its claim that it was a holder of the notes in due course, and nothing contradictory thereof appears in the record.

Nor are we able to find that the respondent sustained his claim of want of consideration. The notes were given as the purchase price of three phonographs. The order for the phonographs was in writing and directed the seller to "Deliver to me (the respondent) at your earliest convenience f.o.b. Los Angeles, or your distributing point, the articles mentioned" in the order. The respondent testified that one of the phonographs did not reach him, but his further evidence tended to show that it had been shipped and the bill of lading forwarded him. This being the fact, delivery was made when the articles were delivered to the carrier, and it is not a defense to the notes to show

that a part of the property had been lost while in the hands of the carrier.

The respondent also offered testimony to the effect that it was orally agreed as a part of the order that the phonographs should be shipped so as to arrive in time for the Christmas trade, and that they were not so shipped. The court rejected the evidence, and it may be that it afterwards concluded that it was in error in so doing. But the evidence was rightly rejected for the reasons, first, that it tended to vary the written agreement, and second, because the offer was not accompanied by an offer to show that a loss was suffered thereby.

In whatever aspect, therefore, the case is viewed, no defense to the action is shown. The order granting a new trial is reversed, and the cause remanded with instructions to enter a judgment for the plaintiff in accordance with the prayer of its complaint.

[No. 16421. Department Two. October 8, 1921.]

FRANCIS G. CAVERS, *Appellant*, v. HOME TELEPHONE & TELEGRAPH COMPANY OF SPOKANE, *Respondent*.[1]

TELEGRAPHS AND TELEPHONES (7)—EXCESSIVE CHARGES—RIGHT TO RECOVER—VOLUNTARY PAYMENT. Excess charges for telephone service, paid without protest, cannot be recovered by a subscriber where they were not made under a mistake of fact, nor induced by fraud, nor made under the exigencies of business which would sustain loss if the payments were not made.

Appeal from a judgment of the superior court for Spokane county, Back, J., entered November 10, 1920, upon granting a nonsuit, dismissing an action to recover overcharges for telephone service, tried to the court and a jury. Affirmed.

[1]Reported in 201 Pac. 20.

Fred B. Morrill, for appellant.

Post, Russell & Higgins, for respondent.

MAIN, J.—The plaintiff brought this action upon twenty-eight assigned claims, seeking to recover what was alleged to be an overcharge for telephone service in the city of Spokane. After the issues were framed, the cause came on for trial before the court and a jury. At the conclusion of the plaintiff's evidence, the defendant challenged the sufficiency thereof and moved the court for a judgment in its behalf. This motion was sustained and a judgment entered dismissing the action, from which the plaintiff appeals.

The respondent, the Home Telephone & Telegraph Company, is engaged in the business of operating a telephone exchange in the city of Spokane. Early in the year 1915, it acquired property of the Pacific Telephone & Telegraph Company, which, prior to that time, had operated an exchange in the same city. The franchise ordinance under which the respondent operated provided for a telephone charge for residence telephones of two dollars per month. After the respondent had taken over the property of the Pacific Telephone & Telegraph Company, it filed with the public service commission a schedule of rates, and thereafter charged for services in accordance with the rates so filed. The public service commission did not enter an order approving the rates, and in *State ex rel. Ellertsen v. Home Telephone & Telegraph Co.*, 102 Wash. 196, 172 Pac. 899, it was held that, in the absence of some affirmative action on the part of the commission, the franchise rate was not modified.

After this decision was made, the appellant took assignments of the claims of the individual subscribers for telephone service and sought to recover the overcharge which had been paid. The appellant claimed

the right to recover because, under the rules and course of business established by the respondent, telephone service would not have been rendered if the parties seeking the same had declined to pay the sums demanded, and that this amounted to payment under compulsion or duress. There is no evidence of the payments having been made on account of mistake of fact or fraud. If the appellant is entitled to go to the jury upon a question of fact, it is by reason alone that the payments were made in excess of the legal rate, and that, under the rules of the course of business established by the respondent, the service would not have been rendered had the payments not been made. The payments were not made under protest. The appellant relies upon a line of cases which hold that, where excess charges are exacted and if not paid loss or destruction of profitable business will result, this is sufficient compulsion and will sustain an action to recover back the excess, even though not paid under a mistake of fact or fraud. *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6; *Heiserman v. Burlington C. R. & N. R. Co.*, 63 Iowa 732, 18 N. W. 903; *Swift Co. v. United States*, 111 U. S. 22; *Robertson v. Frank Bros. Co.*, 132 U. S. 17; *California Adjustment Co. v. Atchison T. & S. F. R. Co.*, 179 Cal. 140, 175 Pac. 682. Those are all cases wherein payments were made under the exigencies of business which would sustain loss or destruction if not made. They represent the relaxation of the old rule as applied to business, which was very much more strict than that adhered to by the more modern authorities. As stated in *American Brewing Co. v. St. Louis*, 187 Mo. 367, 86 S. W. 129:

"Among the instances of the relaxation of the strictness of the original rule, is the case of payments constrained by business exigencies, that is, payments of illegal charges or exactions under apprehension on the

part of the payors of being stopped in their business if the money is not paid."

The case of *Olympia Brewing Co. v. State,* 102 Wash. 494, 173 Pac. 430, is within this class. It was there said:

"It cannot be gainsaid that payments made to prevent the sacrifice of large capital investments are not voluntarily made but are made as the result of compulsion."

So far as we are informed, no case has gone so far as to apply this rule to excess charges where business would not be affected thereby. As already stated, the excess charges sought to be recovered in this case were for residence and not business telephones. In *Illinois Glass Co. v. Chicago Telephone Co.,* 234 Ill. 535, 85 N. E. 200, a customer of the telephone company sought to recover excess charges for services voluntarily paid without fraud, mistake of fact, or other grounds for annulling the contract. There the telephone company had previously been rendering service to the plaintiff and made a contract agreeing to furnish an improved service at an advance rate which was in excess of the franchise charge permitted the company, and it was there held that, since the excess payments were made without fraud, mistake of fact, or other ground for annulling the contract, no recovery could be had. It is true that in that case the plaintiff knew that it was making a contract for a greater rate than it had previously paid under the rate fixed in the franchise, but this can make no difference as applied to the facts in the present case, because the rate of the respondent company was fixed by the ordinance, and the customers seeking telephone service were charged with knowledge of the provisions of such ordinance. *Hope v. City of Alton,* 214 Ill. 102, 73 N. E. 406; *Jackson v. Grand Avenue R. Co.,* 118 Mo. 199, 24 S. W. 192.

The charges not having been made under mistake of fact, induced by fraud, nor having been made through the exigencies of business, a cause of action was not made out, and the trial court correctly sustained the challenge to the sufficiency of the evidence at the conclusion of the appellant's case.

The judgment will be affirmed.

PARKER, C. J., TOLMAN, HOLCOMB, and MITCHELL, JJ., concur.

[No. 16709. *En Banc.* October 8, 1921.]

E. R. SCHOEN *et al.*, *Appellants*, v. THE CITY OF SEATTLE *et al.*, *Respondents*, H. H. WELLS, *Intervener and Respondent.*[1]

MUNICIPAL CORPORATIONS (236)—IMPROVEMENTS—ASSESSMENTS—AMOUNT OF ASSESSMENTS—LIMITATIONS — STATUTES — CONSTRUCTION. Laws 1915, ch. 168, § 1, providing that the cost of a local improvement shall "not exceed fifty per cent of the valuation of the real estate, exclusive of improvements thereon, within such district, according to the valuation last placed upon it for the purpose of general taxation," is not a limitation to the assessed value of the property where that differs from the actual value; in view of Laws 1913, p. 438, § 1, which provides that "all property shall be assessed at not to exceed fifty per cent of its true and fair value in money."

STATUTES (67)—EXECUTIVE CONSTRUCTION. The construction of a statute by executive officers in a way other than its language plainly imports is not controlling on courts when called upon to determine its meaning.

Appeal from a judgment of the superior court for King county, Hall, J., entered August 22, 1921, in favor of the defendants, dismissing an action to enjoin the construction of a public improvement and the levying of an assessment therefor, tried to the court. Affirmed.

[1]Reported in 201 Pac. 293.

Flick & Paul, for appellants.

Hastings & Rubens, for respondent J. L. Smith.

Walter F. Meier and *Edwin C. Ewing*, for respondent City of Seattle.

MAIN, J.—This action was brought for the purpose of restraining the carrying forward of a local improvement and levying an assessment therefor. The cause was tried to the court without a jury, and resulted in a judgment dismissing the action, from which the plaintiffs appeal.

On the ninth day of February, 1920, the city council of the city of Seattle passed an ordinance providing for improvement of Tenth avenue northeast, by curbing, side sewers and water mains. On the same day an ordinance was passed providing for improvement of the same street by paving. It will be assumed, but not decided, that the two ordinances constitute but a single improvement. Giving effect to this assumption, the cost of the improvements will be less than fifty per cent of the actual value of the property within the proposed improvement district, but more than fifty per cent of the assessed value thereof. The boundaries of the districts proposed under each of the ordinances coincide. The question then is whether the limitation for the amount of a local improvement is fifty per cent of the assessed value of the property within the district or fifty per cent of the actual value. Section 1, ch. 168, of the Laws of 1915, p. 526, provides that the estimated cost and expense of a local improvement which may be assessed against property in the proposed district shall "not exceed fifty per cent of the valuation of the real estate, exclusive of the improvements thereon, within such district, according to the valuation last placed upon it for the purpose of general taxation." This language is the same as that found in § 12, ch. 98, of the

Laws of 1911, p. 441. Prior to 1913, the assessed value of real estate and the actual value were theoretically the same. Section 1, ch. 140, of the Laws of 1913, p. 438, provides:

"All property shall be assessed at not to exceed fifty per cent of its true and fair value in money. In determining the true and fair value of real or personal property, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the said property would sell at auction, or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made."

At the legislative session for the year 1919 (§ 4, ch. 142, p. 393, Laws of 1919), this section was amended in particulars not here material. Prior to the passage of the act of 1913, above referred to, no question as to whether the limit for local improvement assessment would be fifty per cent of the assessed value or fifty per cent of the actual value could arise because they were the same. The act of 1913 provided that all property should be assessed at not to exceed fifty per cent of its true and fair value in money. In order to determine, under the section from the act quoted, fifty per cent of the true and fair value in money, it was necessary, first, for the assessing officers to determine the actual value. Construing this statute, it was so held in *Hansen v. Hoquiam,* 95 Wash. 132, 163 Pac. 391. In that case the question was whether the city of Hoquiam had exceeded its debt limit as fixed by § 6, art. 8, of the constitution. The constitution provided that the debt limit should not "exceed five per cent of the value of taxable property therein to be ascertained by the last assessment for state and county purposes previous to

the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for such purposes . . ." Construing this language, it was there held that the limitation of indebtedness was five per cent of the actual value of the property, and not five per cent of the assessed value. The language of the constitution is strikingly similar to the language of the statute limiting the cost of a local improvement which may be assessed against the property in a proposed district to fifty per cent of the "valuation of the real estate . . . according to the valuation last placed upon it for purposes of general taxation." The constitutional language is "value of a taxable property which is to be ascertained by the last assessment." The language of the statute is fifty per cent of the "valuation of the real estate according to the valuation last placed upon it for purposes of general taxation." In effect the language is the same, and in principle the *Hansen* case is controlling. The close analogy of that case to the present one is recognized by the appellants, but they insist that it should not be followed. The statute nowhere mentions assessed value, but speaks of valuation of the real estate.

Prior to the passage of the act of 1913 fixing the limitation of assessment for general taxation at fifty per cent of the value, as stated, the assessed value and the actual value were theoretically the same. It cannot be held, as argued by the appellants, that the language of the local improvement act meant assessment value only prior to the passage of the act of 1913. It had a dual meaning—both the assessment value and the actual value. The passage of the act of 1913 limiting the assessment did not destroy the force of the effect of the local improvement act which provided that the limitation should be fifty per cent of the valuation

of the property and determined the manner in which that valuation should be ascertained. There are a number of cases from this court cited by the appellants where it may be said that the court assumed that the assessed valuation was to be taken as the standard, but in none of those cases was the question here presented either considered or determined. The fact that the court may have assumed, without determining, that the limitation was fifty per cent of the assessed value and that the executive officers so construed the statute, if such be the fact, would not operate to control the construction of the language used and give it a meaning other than it plainly imports.

The judgment will be affirmed.

PARKER, C. J., TOLMAN, MITCHELL, HOLCOMB, FULLERTON, BRIDGES, and HOVEY, JJ., concur.

[No. 16338. Department One. October 8, 1921.]

EDWARD I. SMITH, *Respondent*, v. LOUIS H. ANDERSON *et al.*, *Appellants*.[1]

BOUNDARIES (10-1) — PARTIES (42) — ESTABLISHMENT OF BOUNDARY — BRINGING IN NEW PARTIES — INTEREST IN CONTROVERSY. In an action to determine the boundary line between two owners of quarter sections of land under the government survey, adjoining landowners who may or may not be affected by a relocation of the section corners are neither necessary nor proper parties.

Appeal from a judgment of the superior court for Stevens county, Oswald, J., entered July 10, 1920, in favor of the plaintiff, in an action to establish a boundary line, tried to the court. Affirmed.

Zent & Jesseph, for appellants.

Ferris & Ferris and *John M. Cannon*, for respondent.

[1]Reported in 201 Pac. 1.

FULLERTON, J.—The respondent, Smith, owns the northwest quarter of section 30, in township 30, north, of range 39, east of the Willamette Meridian, and the appellants Anderson and Leetsch own the northeast quarter of the same section. In January, 1916, the respondent began the present action against the appellants, under §§ 947-949 of Rem. Code (P. C. §§ 7412-7414), alleging that the boundary line between their several tracts of land had become obscure and uncertain, and that they, as adjoining proprietors, could not establish the same by agreement, and prayed that the court appoint a commissioner to survey, establish and properly mark the boundary line. The appellants answered, admitting the allegations of the complaint, and joining in the prayer for the appointment of a commissioner, Pursuant thereto, the court appointed a commissioner to survey and mark the line, who in due time made the survey and returned into court a plat and the field notes thereof. The appellants excepted to the report, and a hearing was had thereon, during the course of which it developed that no actual survey of the township had ever been made by the surveyors of the government; that, while the exterior boundaries of the township had been run and properly marked on the ground, the interior surveys had not been so run and marked, although the surveyor appointed for that purpose had so reported, returning to the government with his report field notes purporting showing a proper survey. This fact became known to the commissioner appointed by the court during the course of his work, and to establish the disputed boundary line he found it necessary to determine the proper location of the southwest and the northeast corners of section thirty. In the course of the hearing it developed, also, that the lands in the sections adjoining section thirty had passed into private ownership, and the appellants, conceiving that

these adjoining proprietors had an interest in the matter in litigation between the parties, moved the court to require them to be brought into the case and made parties thereto before proceeding further therewith. This motion the court denied, and, after further hearing, rendered and entered a decree confirming the line established by the commissioner as the true dividing line between the premises of the parties.

On the appeal the sole error assigned is the refusal of the court to require the owners of the surrounding tracts of land to be made parties to the action. But it would seem that the question requires no extended discussion. Manifestly, these parties have no interest in the actual controversy before the court. It is a matter of indifference to them where the line in dispute is located, as their rights are in no manner affected thereby. It is possible, as the appellants argue, that a controversy may subsequently arise between the appellants and the adjoining proprietors as to the true location of the corners of the section in controversy, and it is possible that in the determination of the controversy the corners may be located at a different place than the place where the commissioner found them to be, and it is possible that the location so determined upon may make the section of lesser area than the commissioner made it, and thus operate to the injury of the appellants.

But it is at once apparent that the opposite of these possibilities is equally probable; that is to say, no controversy over the proper location of the corners may ever arise, or, if it does arise, the parties may be able to agree as to the proper location, or, if the controversy proceeds to a determination by the court, it may be found that the section is of greater area than the commissioner found it to be, and the appellants thus be gainers rather than losers by the determination. The

correct answer, however, is, we think, that these adjoining proprietors have no interest in the controversy now before the court and their presence is not necessary to its complete determination. It is clear that to bring the parties in would introduce a new controversy which possibly could not be determined without the introduction of others. And it could be that the circle would so widen as to involve all landowners in the township, many of whom may be satisfied with the existing lines. In the determination of controversies a court is not required to borrow trouble. It does its full duty when it determines the immediate controversy before it. In this instance the court had before it only the duty of properly locating the disputed boundary line, and the parties immediately affected were the only necessary or proper parties.

There was no error in the judgment, and it will stand affirmed.

PARKER, C. J., MACKINTOSH, BRIDGES, and HOLCOMB, JJ., concur.

[No. 16369. Department One. October 8, 1921.]

JOSEPH HARRINGER, *Respondent*, v. THOMAS KEENAN, *Appellant*.[1]

DISMISSAL AND NONSUIT (11)—SETTING ASIDE AND REINSTATEMENT. Motion for reinstatement of an action, dismissed for failure to file a cost bond, is the proper remedy where plaintiff either had no notice of the application for the bond, or had a valid excuse due to poverty induced by illness.

SAME. A motion to reinstate a cause of action which had been improperly dismissed does not necessitate a showing of a meritorious cause of action, since the cause of action necessarily appears in the complaint.

APPEAL (437) — REVIEW — HARMLESS ERROR — PLEADINGS. The denial of a motion to make a complaint more definite and certain, and the overruling of a demurrer to the complaint, will not on appeal be deemed prejudicial, where each party was allowed to present all his evidence, the complaint being deemed amended to conform to the facts.

HUSBAND AND WIFE (120)—ALIENATION OF AFFECTIONS—EVIDENCE—ADMISSIBILITY. In an action for alienation of affections, letters written by the wife to her husband showing affection are admissible, though written subsequent to the time defendant began attentions to the wife.

SAME. In an action for alienation of affections, a letter purporting to come from the wife after separation of the spouses, which was in the handwriting of defendant, is admissible for the purpose of showing his influence over her.

EVIDENCE (130, 139)—DOCUMENTARY EVIDENCE — LETTERS — AUTHENTICATION. Letters by a wife to defendant in an action for alienation of affections are properly admitted in evidence where their authorship is demonstrated by comparison with the admittedly genuine handwriting of the wife.

WITNESSES (61, 98-1)—EXAMINATION—LEADING QUESTIONS—HOSTILE WITNESS—RIGHT TO IMPEACH OWN WITNESS. Leading questions may be propounded by a party to a witness who proves hostile, and such witness may be impeached by showing contradictory statements before the trial.

HUSBAND AND WIFE (120)—ALIENATION OF AFFECTIONS—EVIDENCE—ADMISSIBILITY. A property settlement by husband and wife

[1]Reported in 201 Pac. 306.

after separation cannot be shown in evidence by defendant in an action for alienation of the wife's affections.

SAME (120)—ALIENATION OF AFFECTIONS — EVIDENCE — SUFFICIENCY. A finding that the defendant alienated the affections of plaintiff's wife is supported by evidence that the spouses lived together for nearly twenty-two years, having a mutual affection for each other; that plaintiff was required to be away from home a portion of each year in his calling as a fisherman; and that during these periods of absence the defendant paid the wife marked attention, with the result that she transferred her affections to him and finally abandoned her husband.

Appeal from a judgment of the superior court for King county, Pemberton, J., entered November 17, 1920, upon findings in favor of the plaintiff, in an action for alienation of affections, tried to the court. Affirmed.

Arthur C. Bannon, for appellant.

Joseph M. Glasgow and *Van C. Griffin,* for respondent.

FULLERTON, J.—In this action the respondent, Harringer, sued the appellant, Keenan, for alienation of his wife's affections. The cause was tried by the court, sitting without a jury, and resulted in a judgment in favor of the respondent for the sum of six hundred dollars.

The first error assigned on the appeal is that the court erred in reinstating the cause after it had been dismissed for the failure of the respondent to file a nonresident cost bond. It appears that the appellant, on his appearance in cause, moved for a cost bond, and that the court ordered such a bond to be furnished on or before a date fixed in the order. The bond was not so furnished, and the action was dismissed on the *ex parte* application of the appellant. Afterwards the respondent applied by motion to have the cause reinstated, basing his motion upon two grounds, first, that

it had been entered without notice to him, and second, that he had been unable to furnish the bond in the required time because of his extreme poverty induced by illness. The trial court granted the motion, and it is objected that motion was not the proper remedy, as relief on the grounds stated can only be had by petition under §§ 464-473, Rem. Code (P. C. §§ 8130-8139). But the remedy by motion is proper when based upon the first ground stated. *Griffith v. Maxwell,* 25 Wash. 658, 66 Pac. 106. Whether on the second ground the remedy by petition is the only remedy, we need not consider. The matter set forth thereunder was pertinent to be considered with the first ground of the motion, as it clearly showed that the plaintiff's failure to file the bond within the required time was founded upon a valid excuse, and was not due to neglect or to a wilful disregard of the order of the court.

The second contention under this head is that the application was not accompanied by a showing of a meritorious cause of action. But this is not necessary where a plaintiff seeks to be relieved from a default inadvertently entered against him. His cause of action appears in his complaint, and repetition thereof would in no manner enlighten the court. The cases cited in support of the point, namely, *Hoefer v. Sawtelle,* 43 Wash. 23, 85 Pac. 853; *Brandt v. Little,* 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213; and *Chehalis Coal Co. v. Laisure,* 97 Wash. 422, 166 Pac. 1158, are cases where a defendant sought relief from a judgment against him. In such instances the courts generally hold it necessary to show, in addition to the causes for vacating the judgment, that the applicant has a meritorious defense to the action in which the judgment against him was entered. This for the reason that it does not otherwise appear; a principle inapplicable to the plaintiff in an action.

The second assignments to be noticed are that the court erred in denying the motion of the appellant to make the complaint more definite and certain, and erred in overruling his demurrer to the complaint. But these assignments are of but little moment at this stage of the proceedings, even though they were technically well taken when interposed. The trial court treated the complaint as sufficient, and allowed each side to present all of his evidence which bore upon the general question. The appellant, therefore, suffered no prejudice from the rulings of the court, whatever view may be taken as to the correctness of its ruling. Error without prejudice, as we have often said, is not ground for reversal. Moreover, we are admonished by the code to consider all amendments as made which could have been made, and were we to find that the complaint was less specific than it should have been, we would treat it as amended to conform to the facts.

The next assignments relate to the admission of evidence. It is contended that inadmissible evidence was admitted and considered by the court, and that, with this eliminated, insufficient evidence remains to support the judgment. Specifically, objection is made to the introduction of some five letters written by the wife to the husband during the year preceding their separation. The letters were couched in endearing terms, and tended strongly to show that the wife had, at the time they were written, a strong affection for the respondent. It is not contended, if we understand the appellant, that letters of this sort are inadmissible under all circumstances, but that they were inadmissible under the particular circumstances of the present case, since it was shown that they were written after the time the appellant began his attentions to the wife. The objection is not tenable. Alienation of affections is not usually accomplished on the instant. It is ordi-

narily a gradual process, extending over a considerable period of time, and it cannot be said to be finally accomplished until some overt act takes place which shows a want of affection. Here the overt act was separation, and letters written prior thereto were admissible. Such was the effect of our holding in *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 72 Am. St. 98, 43 L. R. A. 114, and *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187. In the latter case we said:

"It is well settled that acts and declarations of the husband in a case like this may be shown at and prior to the time of separation, for the purpose of showing affection."

Another letter purporting to come from the wife, written some ten days after the separation, was also admitted over objection. But this was admitted for a purpose other than to show affection, although its tenor was to that effect. It was testified to be in the handwriting of the appellant, and was admissible to show his then influence over her.

Objection is made to the admission and consideration of certain letters purported to have been written by the wife to the appellant. It is objected to these that they were not sufficiently proven, but the evidence leaves but little doubt on that score. A comparison of the handwriting with the admittedly genuine handwriting of the wife demonstrates their actual authorship.

Another assignment is that "the leading questions propounded to, and the attempted impeachment thereafter by the respondent of his witness, Mary Brugger, was improper, and the court erred in the allowance thereof." But there was nothing improper in this. The witness, while at first friendly and free to talk, became hostile before the actual trial and would answer only when direct questions were put to her.

The purported impeachment went no further than to show that she had previously made, both orally and in writing, statements contradictory of her then testimony. In trials before a jury it is well settled that leading and suggestive questions may be asked of a hostile or unfriendly witness, and the rule does not infringe on the other general rule that a party may not impeach his own witness. In this instance, since the case was tried by the court without a jury and is thus triable here *de novo,* the question only affects the weight of her testimony. Under no circumstance could it be error for which a new trial must be granted.

The court denied the appellant the right to show a property settlement had between the husband and wife after the separation. There was no error in the ruling. Plainly, the transactions between the husband and wife with relation to their property after their separation would have no tendency to show that the appellant had not alienated the wife's affections.

Finally, it is objected that the preponderance of the evidence does not support the findings of the trial court. But on this question the evidence hardly leaves a doubt. The story is not an unusual one. The respondent and his wife were married on August 17, 1896. They lived together as husband and wife until June 8, 1918, when the wife left their home. His testimony and her letters to him show that, until the appearance of the appellant, and for a considerable time thereafter, they had for each other mutual affection and regard. The respondent was a fisherman and for a time in each year was away from his home in the pursuit of his calling. During these periods of absence the appellant paid the wife marked attention, with the result that the wife's affections were transferred from her husband to the appellant, the final result being the abandonment of the husband by the wife. The appel-

lant's acts constituted actionable wrong, and the award made by the trial court is not disproportionate to the wrong suffered.

The judgment is affirmed.

PARKER, C. J., HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

[No. 16431. Department One. October 8, 1921.]

W. G. PATRICK, *Respondent*, v. SPOKANE & EASTERN RAILWAY & POWER COMPANY, *Appellant*.[1]

MASTER AND SERVANT (130)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—PRESUMPTIONS AND BURDEN OF PROOF. Though an inference of negligence may arise from proofs of an accident causing an injury when attended with certain circumstances, even if there is no direct proof of specific negligence, an inference of negligence sufficient to make a prima facie case does not arise from the mere happening of an accident.

SAME. A workman in a railway repair shop who is injured by being struck by a casting which fell from a traveling crane cannot recover merely on the ground that the accident showed negligence on the part of the master, where there was no proof that the crane was furnished for plaintiff's use, or that he was using it at the time, or that the castings were improperly tied, the evidence, however, showing that plaintiff had left a place of safety, and entered into the zone of danger merely to expedite the return of the crane for use at the point where he was engaged in working.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered October 5, 1920, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a railway repair shop. Reversed.

Graves, Kizer & Graves, for appellant.

Tustin & Chandler, for respondent.

FULLERTON, J.—The appellant, Spokane & Eastern Railway & Power Company, is engaged in the business

[1]Reported in 201 Pac. 23.

of operating a railway, and maintains a repair shop at the city of Spokane. This repair shop is of considerable size, and is equipped with an electrically operated traveling crane, used for the purpose of moving heavy articles from one part of the shop to another. Prior to October 3, 1919, the appellant had let a contract for the reconstruction of a bridge on its railway line, and on the day named the employees of the bridge contractor brought to the appellant's shop a number of iron castings upon which certain shop work was necessary to be done. The castings were brought to an entrance door of the shop on a push car. The machinery necessary to do the work the castings required was at the opposite end of the shop, and to carry the castings across the building, the traveling crane was brought into service. To sling the castings for carriage, a rope some two inches in diameter was used. The method by which the rope was fastened to the castings and carried across the building was illustrated to the jury and is not very clearly depicted in the record, but as we gather it, the method was this: The rope was doubled and laid on the floor of the building; the castings, which were rectangular in shape and some four feet in length, were laid across the doubled rope in a sufficient number to make a load; the two ends of the rope were then twisted and the twisted end put through the loop at the double end and drawn tight; a chain, with a hook on its end, leading down from the crane was then fastened into the rope; the load was then drawn upwards towards the crane to a height of about ten feet, and from thence was carried across the building by moving the crane. The crane was operated from the floor of the building by means of a rope or chain fastened to the electrical connections; the operator walking in front of the load and some twelve feet to one side. This walk way was kept clear at all times,

and was a common passageway used by the appellant's employees in crossing the building.

The respondent was an employee of the appellant. At the time the castings were brought to the building, he was working upon one of the appellant's electric engines. He had loosened the fastenings of a motor and desired the use of the crane to lift the motor from the engine. On looking for the crane he saw it in use by the persons carrying the castings. It had just been started on its way with a load, and, thinking to obtain it when it reached its destination, he followed after it, walking in the usual walk way. As he reached a place about opposite the load, the castings slipped from the rope and one of them, striking some object in its fall, glanced in his direction, striking him on one of his legs and severely injuring him. In this action the respondent seeks recovery for the injury suffered. He was successful in the court below, and this appeal is from the judgment rendered in his favor.

The assignments of error question only the sufficiency of the evidence to justify the verdict. In his complaint the appellant alleged that the castings were "tied or bound together in a careless and negligent manner, rendering them loose and insecure in the sling in which they were contained," and that the appellant's foreman operated the crane "in a careless and negligent manner, jerking said sling," thereby causing the castings to fall therefrom. To sustain these allegations of negligence, there is no direct evidence in the record. While the manner in which the castings were slung in the rope was shown, no one testified that the method used was not the usual or ordinary method for slinging such articles for carriage, nor did anyone testify that there was anything careless, negligent or inherently dangerous in the manner in which the castings were tied or bound together. Nor did anyone testify

that the crane, after the load had been fastened thereto, was operated in a careless or negligent manner causing it to jerk the sling, or in a careless or negligent manner in any other respect—on the contrary, the direct evidence is that the crane was operated in the usual and customary manner. If, therefore, there is evidence of negligence in the record, the proofs thereof are indirect; it is an inference arising from the fact that the castings fell from the sling while in the process of carriage.

But this court has never heretofore held, and it is not the general rule, that an inference of negligence sufficient to make a *prima facie* case arises from the mere happening of an accident although it cause an injury. We have held that such an inference may arise from proofs of an accident causing an injury when attended with certain circumstances, although there is no direct proof of specific negligence on the part of the master. For example, in *La Bee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405; 51 Wash. 81, 97 Pac. 1104, the servant was injured by the breaking of a cable used for loading logs upon railway cars. In addition to the happening of the accident causing the injury, it was shown that the cable was one furnished by the master for the servant's use, and that it broke while the servant was using it for the purpose for which it was furnished him and in the manner he was directed by the master to use it. It was held that the proofs made a *prima facie* case sufficient to sustain the verdict of the jury in favor of the servant, notwithstanding it was not shown that the master had failed to exercise reasonable care in the selection of the cable or reasonable care in keeping it in a condition suitable for use. So in *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888, it was held that a servant could recover for an injury caused

by the fall of a scaffold on which he was working, on a showing that the scaffold was furnished him by the master for his use and that he was using it for the purposes intended and in the manner intended, although he did not show that the master had not exercised reasonable care in its construction and maintenance. To the same effect is *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162. In these cases the doctrine known as *res ipsa loquitur* was applied. But the doctrine as there defined, and as it has elsewhere been defined by us, is not a rule of substantive law, but a rule of evidence merely. Nor is the rule one of universal application to be invoked in all cases of accident and injury. As we said in *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838, L. R. A. 1917E 178 (quoting from *Losie v. Delaware & H. Co.*, 142 App. Div. 214, 126 N. Y. Supp. 871):

"The doctrine of *res ipsa loquitur* was not intended to exempt the plaintiff from the burden of proving affirmatively negligence, or circumstances making negligence a legitimate, if not an irresistible, inference. In the language of Judge Cullen in *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, its 'application presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence.' It is not the accident, but the manner and circumstances of the accident, that justified the application of the maxim. The fact of the casualty and the attending circumstances may themselves furnish all the proof of negligence that it is necessary to offer; but when, as in this case, they do not, a plaintiff must prove facts and circumstances from which the jury may fairly infer negligence as the cause of the accident. 'In no instance can the bare fact that an injury has happened, of itself and divorced from all surrounding circumstances, justify the inference that the injury was

caused by negligence.' *Benedick v. Potts,* 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478."

Tested by these principles, we think it is at once manifest that the evidence was insufficient to charge the appellant with negligence. All that is shown that tends in that direction is the happening of the accident and the resultant injury. There is no showing that the instrumentality which gave way and caused the injury was furnished by the master for the respondent's use, nor was he in fact using it at the time of the injury. Nor is there any other circumstance that can be said to bring the facts within the rule stated. It might have been so had the respondent's place of work been rendered unsafe by the act of moving the castings. But it was not so rendered. When the castings started on their journey the respondent was in a place of safety, and he was injured because he voluntarily left this place of safety and entered into the zone of danger. Therefore, to warrant a finding of negligence on the part of the master, there should have been some proof other than the mere happening of the accident; some direct evidence independent of the accident reasonably indicating a neglect of duty.

We have not overlooked the argument of the respondent's learned counsel to the effect that the method of tying the castings was in itself gross negligence; that the rope, in addition to being placed around the center of the castings, should have been placed over their ends, so as to prevent them from slipping from the rope in case they became unbalanced. But this is but arguing from effect to cause. Had they been so tied, and had they nevertheless slipped from the fastenings, the argument would be open that they were insecurely tied. Indeed, it would seem that no matter what method of carriage was used, or what care was exercised in providing the carriage, if the

carriage gave way it could be argued against the method used, with all the force of the argument against the method used here, that the carriage was insecure and thus implied negligence.

Our conclusion is that the judgment appealed from should be reversed, with instructions to enter a judgment that the plaintiff take nothing by his action. It is so ordered.

PARKER, C. J., MACKINTOSH, BRIDGES, and HOLCOMB, JJ., concur.

[No. 16466. Department One. October 11, 1921.]

FIDELITY SECURITIES COMPANY, *Respondent*, v. ORISON DICKINSON *et al.*, *Defendants*, MARIE M. MARTIN *et al.*, *Appellants*.[1]

CONTRACTS (40)—VALIDITY. A contract to purchase delinquency certificates expressly authorized by statute is not invalid.

DEEDS (3) — PARTIES — DEATH OF GRANTEE BEFORE DELIVERY. Deeds executed pursuant to a contract to a grantee in ignorance of his death will be treated in equity as a deed to his estate.

SAME (55)—EVIDENCE—CONSIDERATION. Where negotiations for a conveyance are conducted by a father and a deed is executed to his daughter as grantee, the presumption, in the absence of evidence, is that the consideration was paid by the daughter.

TAXATION (191)—TAX TITLES—PRIORITY OVER PRIOR MORTGAGE. One acquiring property under a tax deed assumes no obligation to a mortgagee of the property to pay off the taxes accumulated subsequent to his mortgage, and therefore a tax title is superior to the lien of a prior mortgage.

SAME (177)—TAX DEEDS—TITLE ACQUIRED—MERGER OF ESTATES. The fact that the holder of a tax certificate took a quitclaim deed to the property from the owners before the period of redemption had expired, would not constitute a merger of the title under tax deed with that acquired by deed from the owners.

[1]Reported in 201 Pac. 301.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 23, 1920, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Reversed.

Karl H. Kober and *Walter A. Keene* (*Howard A. Adams,* of counsel), for appellant.

Wright, Kelleher, Allen & Hilen, for respondent.

FULLERTON, J.—On November 18, 1911, Orison Dickinson and wife owned certain real property situated in the city of Seattle. On that day they mortgaged the property to the First Mortgage & Savings Bank to secure a loan in the sum of $1,200 then made by the bank to them. Subsequent thereto the mortgage by assignments, duly and regularly executed, passed into the possession and ownership of the Fidelity Securities Company, the respondent on this appeal. No part of the principal of the loan was ever paid. Interest was paid thereon according to the terms of the loan down to the year 1916, but nothing more.

In the year 1914, Dickinson and wife conveyed the property to one William D. Ingalls, and subsequent thereto the title to the property passed by mesne conveyances through sundry holders to one Elizabeth M. Davis and one John Carrigan, in whom it was vested in the year 1919. In 1910, the city of Seattle authorized the construction of sewers in the streets and avenues abutting upon and adjacent to the property, providing in the ordinances that the cost of the sewers should be paid by assessment upon property benefited.

Pursuant to the ordinance, the city of Seattle caused an assessment to be levied upon the property in question, payable in installments. One such installment was not paid, and subsequently the city caused the property to be sold under the lien of assessment. No other purchaser appearing at the sale, the city pur-

chased the property for the amount of its lien thereon, and issued to itself a certificate of sale. On February 13, 1919, more than two years after the sale of the property to the city, C. V. Martin, acting pursuant to a contract entered into between himself and Theodore Zilinsky, purchased the certificate of sale in the name of Zilinsky. Immediately after the purchase of the certificate, notice was given in the name of Zilinsky to the owners of the property, under § 33, ch. 98, p. 461, Laws of 1911, that Zilinsky was the holder of the certificate of sale, and that he would demand a deed to the property from the city.

After service of the notice, and prior to the expiration of the sixty-day period in which the owners are permitted under the statute to redeem from the sale, Martin, in the name of Zilinsky, took quitclaim deeds to the property from the owners. Between the time of the service of the notice and the delivery of the deeds Zilinsky died, a fact unknown to Martin. Zilinsky left a will in which Rudolph Beck was named as executor, and in due course he was appointed and confirmed as such by the superior court of King county. Acting in the name of the executor, Martin applied to the city for a deed to the property. At that time the sixty-day period in which Elizabeth M. Davis had the right to redeem by the terms of the statute had expired; Carrigan's time, however, had as yet some days to run. The city officers treated his quitclaim deed as a waiver of his right, and on May 12, 1919, one day prior to the time Carrigan's right to redeem expired, issued to the executor a deed to the property. Subsequently, and on May 29, 1919, the city issued to the executor another deed to the same property. This deed differed in no respects from the earlier deed, save that it had written on its margin the words, "Correction Deed."

By the terms of the contract between Zilinsky and

Martin, Zilinsky agreed, in the case he should obtain title to the property, to deed the same to Martin "or his daughter," for the consideration of three hundred dollars in cash and a note for fifteen hundred dollars, payable three years after its date, with interest at seven per centum, payable semi-annually, secured by a mortgage on the property. On the execution of the deed to him from the city, the executor, pursuant to the terms of this contract, and with the leave and approval of the court in which the probate proceedings were pending, conveyed the property to Marie M. Martin, a daughter of C. V. Martin, who, in turn, paid to the executor the sum of three hundred dollars in cash, and executed and delivered to him a note and mortgage in accordance with the terms of the agreement between Zilinsky and her father.

After the occurrence of these transactions, the respondent, as the owner and holder of the Dickinson mortgage, began the present action to foreclose the same. It made parties defendant to the action, among others, the executor, Beck, C. V. Martin, and Marie M. Martin. The complaint was in the usual form, and contained allegations appropriate under our form of procedure to show a lien by mortgage on the property, and a right to its foreclosure. With reference to the defendants named, it was alleged that they had, or claimed to have, some interest in or title to the mortgaged property, but that such interests or liens, if any, were subject and inferior to the plaintiff's mortgage. The defendants named answered separately. C. V. Martin's answer was a disclaimer of interest. Marie M. Martin answered, setting up title herself, claiming title superior to the lien of the plaintiff's mortgage, in virtue of the deed from the city to the executor and the deed from the executor to her. The executor's answer was to the same effect.

The cause was tried on the issues as thus framed, at the conclusion of which the court made, among others, the following findings of fact:

"(I) All of the allegations of the plaintiff's complaint are true and correct.

"(IV) The mortgage described in the plaintiff's complaint is a valid lien upon the property described in the plaintiff's complaint to secure said sums and each of them, and said sums and all of them are due, owing and unpaid.

"(V) Theodore Zilinsky at the instigation of C. V. Martin purchased the record title of certain delinquent tax certificates, the record title of which, after the death of Theodore Zilinsky, descended to Rudolph Beck, as executor of the last will and testament of Theodore Zilinsky, deceased, subject to an agreement whereby the title to said property was to become vested in said C. V. Martin, the said C. V. Martin to pay said Theodore Zilinsky three hundred dollars ($300) in cash and to execute a mortgage to him on said property for the sum of fifteen hundred dollars ($1,500) as compensation to said Theodore Zilinsky for the use of his name and money.

"(VI) Subsequent to the death of Theodore Zilinsky, C. V. Martin, acting for himself and as attorney for said Rudolph Beck, as executor of the last will and testament of Theodore Zilinsky, deceased, for the purpose of obtaining a tax deed to said premises prior to the expiration of the period of redemption, and for the purpose of securing the entire title of said property in order to convey the entire title to Marie M. Martin, C. V. Martin's daughter, purchased for a valuable consideration the fee of said premises from the owners thereof prior to the expiration of the right of redemption from said delinquent tax certificates and with the knowledge both of himself and said Rudolph Beck, executor of the last will and testament of Theodore Zilinsky, deceased, of the death of said Theodore Zilinsky, erroneously filled in the name of Theodore Zilinsky as grantee on May 11, 1919, the deeds having been delivered to said C. V. Martin with the names of the grantees

in blank and authority having been given to him to fill in the blanks.

"(VII) Rudolph Beck, as executor of the last will and testament of Theodore Zilinsky, deceased, acting through C. V. Martin as his attorney, acquired deeds from John Carrigan and Elizabeth M. Davis, the owners of said property for the purpose of inducing the treasurer of the city of Seattle to issue the said tax deeds prior to the expiration of the period of redemption and represented to the treasurer of the city of Seattle that in obtaining said deeds Rudolph Beck, as executor to the last will and testament of Theodore Zilinsky, deceased, became the owner of the fee to said premises.

"(VIII) The use of the names of Theodore Zilinsky and Marie M. Martin were merely assumed names of C. V. Martin, said C. V. Martin being the real party in interest."

As conclusions of law, the court found that the answering defendants were estopped to deny that the executor became the owner of the fee to the property prior to the date of the issuance of the deed from the city on the certificate of sale; that the title acquired by the deed from the city merged in the legal title acquired from such owners; that this title was subsequent and inferior to the lien of the plaintiff's mortgage; and that the plaintiff was entitled to a decree of foreclosure in accordance with the prayer of its complaint. A decree was entered accordingly, from which this appeal is prosecuted.

There is much in the court's findings for which we can find no support in the evidence. It is found that Theodore Zilinsky purchased the certificate of sale from the city of Seattle at the "instigation" of C. V. Martin. If the word "instigation" is here used in its evil and corrupt sense, there is nothing to support it. The evidence on the question is found in the testimony of C. V. Martin. He testifies that he and Mr. Kanters

were engaged in a small way in the real estate business; that Mr. Kanters was an old acquaintance of Mr. Zilinsky, and had made a loan for him which the borrower had repaid; that Mr. Zilinsky came to their office in connection with the matter, and inquired of Mr. Kanters whether he knew of a place where the money could be again loaned or invested; that Mr. Kanters answered that he personally knew of no such place, and called in the witness and put the inquiry to him, when he directed attention to the certificate of purchase held by the city. The result was the written contract hereinbefore mentioned. The contract was entered into after a full explanation of the procedure necessary to be pursued to acquire title under it, and of the probable expense necessary to be incurred in so doing. The contract on its face is explicit and plain. It involved in its execution nothing corrupt or evil; on the contrary, it involved a transaction expressly authorized by statute, and is such a contract as honest men with honest intention and purpose may lawfully make. Mr. Zilinsky entered into it of his own free will, and it is idle to say that he did so at the corrupt solicitation of C. V. Martin.

The finding that the deeds from the owners of the fee to Zilinsky were delivered to C. V. Martin without naming a grantee, and that he, with the knowledge of both himself and the executor, Beck, of the death of Zilinsky, "erroneously filled in the name of Theodore Zilinsky as grantee," is likewise without support in the evidence. The undisputed evidence is that at this time the executor, Beck, knew nothing at all of the transaction, and that Martin did not then know of the death of Zilinsky. The undisputed evidence shows, also, that the grantees' names were inserted in the deeds when they were delivered. The evidence is that C. V. Martin bargained for the purchase of the owner's interest; that this bargaining was made with the agents of the

owners and not with the owners directly; that, after the terms had been agreed upon, the agents procured the deeds from their principals with the grantee's name left blank, with the authority to fill in the name of such person as Martin directed, and that Martin, when the deeds were tendered him, directed that the name of Zilinsky be inserted, and that his name was inserted by the agents before delivery. Manifestly there was nothing "erroneous," corrupt or illegal in this. The intervening death of Zilinsky in no manner affected the legality of the transaction. It was the intention of the grantors to convey the fee. It was the intent of Martin that the title should pass to Zilinsky in accordance with the terms of the contract entered into between himself and Zilinsky. Justice demands that it be so treated, and equity, under a familiar maxim, will treat the conveyances as conveyances to Zilinsky's estate.

Again, the finding that the use of the names of Theodore Zilinsky and Marie M. Martin were merely assumed names of C. V. Martin, "said C. V. Martin being the real party in interest," is also contrary to the evidence. Zilinsky, in his lifetime, advanced the money necessary to finance the transaction, and out of the money so advanced were paid the costs and expenses of procuring the deed from the city. These amounted to a considerable sum. There was paid four hundred and fifty dollars to procure the deeds from the owners of the fee, there was paid more than seven hundred dollars in general state, county and municipal taxes, which the law exacted as a condition precedent to receiving a deed to the property under the city's certificate of purchase; there was paid the amount of the assessment for which the property was sold to the city, with the accumulated costs and interests; and there was paid the costs and expenses of procuring the deed

which involved proceedings in the probate department of the superior court. The amount of these latter items was not shown, but enough is shown to make it certain that there was no great profit in the transaction for Zilinsky's estate. On these advancements the estate has been repaid three hundred dollars in cash, and there has been executed to it a note for fifteen hundred dollars, secured by mortgage on the property. Contrary to the inference which the finding imports, therefore, Zilinsky, in his lifetime, had a substantial interest therein. What the business relations between C. V. Martin and his daughter Marie were, the record does not disclose. Nor does the record disclose whether C. V. Martin or the daughter furnished the cash consideration which was paid to Zilinsky's estate on the execution of the deed. But if this question be material, and it be necessary so to do, the law will presume that it was paid by the daughter. But the record does show affirmatively that it is the daughter and not C. V. Martin who now holds the substantial interest. She has the legal title to the property, and to procure that legal title has obligated herself to pay to the source from which she acquired title the sum of fifteen hundred dollars. C. V. Martin, on the face of the record at least, has now no interest in the transaction whatsoever and is in no wise bound by any contract. It is well to remember, also, in this connection, that the conveyance to the daughter is not an afterthought on the part of anyone. The very contract entered into between Zilinsky and C. V. Martin at the inception of the transaction provides that title to the property when acquired by Zilinsky shall be conveyed to C. V. Martin "or to his daughter." The finding, therefore, that the daughter is without interest has likewise no support in the evidence.

If, then, the decree of the trial court is to be sustained, it must be sustained on the theory stated in the court's conclusions of law, namely, that there has been an estoppel by merger. But we cannot think there is any foundation for this conclusion. Perhaps no better argument on the question can be made than is made by Judge Cooley, in his work on Taxation, vol. 2, p. 972 (3d ed.), where he says:

"It has been very properly held that one who has conveyed lands with warranty cannot, as against his grantee, acquire a tax-title for taxes, any part of which were on the land when his conveyance was given. So he who, pending an injunction sued out by himself to restrain the enforcement of a mechanic's lien, obtains a tax-title, will not be allowed to make use of it to defeat the lien. So a guardian cannot destroy the estate of his wards by purchasing a tax-title adverse to them. So a tax-title to land acquired by one who holds the legal title to the land in trust to secure the legal payment of a debt is also held in trust. So a beneficiary under a trust deed cannot acquire a tax-title adverse to the trust. And any purchase by one who, by contract or otherwise, was under obligation to pay the taxes, will be deemed a payment only. But one who has been in possession under a contract of purchase which he has surrendered is not precluded from buying.

"Whether one should be precluded by the naked fact that he claims title to the land, or that he has possession of it, from making a purchase in extinguishment of the right of another with whom he stands in no contract or fiduciary relations, is a question often touched by the discussion of courts without having as yet been very fully or comprehensively examined. So far as the cases hold that one who ought, as between himself and some third person, to pay the taxes, shall not build up a title on his own default, the principle is clear and well-founded in equity. But when one owes no duty to any other in respect to the land, it is not so clear upon what principle of equity or of estoppel such other is to set up, as against him, his neglect to perform in due season his duty to the state.

"There are some cases in which it has been distinctly held that possession, when the tax was assessed, fixed upon the possessor the duty to pay, and precluded his becoming a purchaser at a sale for the taxes when they became delinquent. In the leading case the occupant had gone into possession under an invalid tax-title, and by the decision he was precluded from relying upon a second title which accrued while he was in the occupancy of the land. The subject is dismissed with very brief mention, the court appearing to regard the claim as inequitable and unjust, but for what reason is not very clearly explained. Other cases treat the point as equally plain. But it seems to be very well deserving of more consideration whether, where parties stand to each other in the position of adverse claimants to land, either of them can insist that the other shall discharge for his protection a duty owing to the public. There being nothing in the relation of the parties to each other upon which an estoppel can be raised, it is necessary to look elsewhere for the disqualification insisted upon; and this can only be found in some general rule of public policy. It is certainly an imperative requirement of public policy that the revenues of the state shall be collected, and that no one shall be allowed to defraud the treasury of his due proportion; but in the case where a tax sale has been made there is no fraud, and the revenue chargeable upon the land has been received. No wrong has consequently been done to the state. There has been delay in payment, but it is one for which the state makes ample provision, and for which it charges and collects all costs, as well as a further sum under the name of interest or penalty sufficient fully to compensate for any public inconvenience. It is not perceived that the state can then have any complaint to make, as the duty owing to it, though performed tardily, has been performed at last, and the incidental inconvenience paid for. The state, then, not being wronged in the purchase, it would seem that if any individual objects to it he ought to be able to point out how and in what particular it wrongs him.

"It is difficult to dispute the truth of what is said by the supreme court of Pennsylvania, that 'there is noth-

ing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes.' As between himself and any adverse claimant, the state is not concerned to inquire whether the one or the other was in possession. If the state, in taxing land, takes any notice of ownership, it is either for the convenience of the officers in making collections or for information to parties concerned. The tax is upon every possible interest in the land; and all parties having interest are equally under obligation to the state to make payment. The penalty for failure is a forfeiture or sale which will cut them all off; and while, without doubt, anyone may defeat such a sale who can give satisfactory reasons for an assertion that it would be unjust to him for the purchaser to be allowed to rely upon it, it is not perceived that any other person can, upon plausible grounds of equity, insist upon the privilege to do so. There are decisions that the possession of a mere intruder or trespasser will not preclude his becoming purchaser; if this is true, mere possession ought not to be an impediment in any case; for the element of wrong involved in the possession of a trespasser cannot, on any grounds of equity or justice, be taken notice of as giving him a privilege denied to one whose possession is rightful."

The case presented for the appellants is even stronger than cases considered by Judge Cooley. The appellants never had possession of the property and never enjoyed any of its rents, issues or profits. The taxes and assessments for which they purchased the property from the city accrued prior to the time they acquired the legal fee from the owners, and they assumed by acquiring the fee no obligation to anyone, not even the state, to pay these accumulated taxes and assessments. No principle of law, equity or morals, therefore, required them to make the payment for the benefit of a mortgagor to whom they were in no manner obligated and whose mortgage antedated the accumulation of the taxes. Again, the doctrine of merger is ap-

plicable only in those instances where a lesser and a greater estate unite in the same person and there is no intermediate estate; and the courts which hold that a title acquired from a tax sale merges in a title derived by grant from the original proprietor do so for the stated conclusion that a tax title is inferior to the granted title. In none of the cases cited is a reason given for the conclusion, and we agree with Judge Cooley that no sound reason exists therefor. Manifestly, in this instance, if either of the titles acquired by the appellants was superior in law or equity to the other, the tax title is the superior title. The fee title was taken subject to all the existing liens on the property, the mortgage as well as the assessment and taxes. The tax title eliminated the mortgage, and on the doctrine as stated, if there is to be a merger at all, it would seem that the fee title merged into the tax title. But, in our opinion, no case is presented for the doctrine of merger. The appellants hold title through two independent sources, and they may plead and rely upon either or both against the suit of any person who asserts an interest in the property.

The decree appealed from is reversed, and the cause is remanded with instruction to enter a decree holding the appellants' title to be superior and paramount to the respondent's mortgage.

PARKER, C. J., HOLCOMB, and BRIDGES, JJ., concur.

[No. 16307. Department Two. October 11, 1921.]

J. S. BOLLONG *et al.*, *Appellants*, v. ALPHA L. CORMAN *et al.*, *Respondents.*[1]

EVIDENCE (157) — MORTGAGES (102) — ASSUMPTION OF MORTGAGE DEBT—PAROL EVIDENCE TO VARY WRITING. An oral agreement by the grantee of mortgaged premises to assume a mortgage thereon is not merged in the executed deed, but is enforcible as a contract independent of and additional to it, and hence is not within the rule against varying or adding to a written contract by parol testimony.

JUDGMENT (227)—BAR—MATTERS AND PARTIES CONCLUDED—MATTERS NOT IN ISSUE. That mortgagors and their grantee were parties defendant to a mortgage foreclosure wherein a deficiency judgment was rendered against the mortgagors was not an estoppel by judgment of the right of the mortgagors to sue their grantee in a subsequent action on her assumption of the mortgage debt, where that issue was not litigated in the foreclosure action.

MORTGAGES (102) — ASSUMPTION OF MORTGAGE — EXPENSES — RECOVERY FROM GRANTEE. Expenditures of mortgagors in a foreclosure proceeding, incurred in a fruitless effort to show that the mortgagee had made a contract releasing them, cannot be recovered in a subsequent action by the mortgagors against their grantee who had assumed the mortgage debt which they were compelled to pay.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 20, 1920, upon granting a nonsuit, dismissing an action for equitable relief, tried to the court. Reversed.

O. O. Felkner and *Tracy E. Griffin*, for appellants.

H. E. Foster and *Carl J. Smith*, for respondents.

MITCHELL, J.—Respondents have moved to strike appellants' brief and dismiss the appeal, upon the ground that the same is not sufficiently definite as to its contents to comply with the rules of court. The motion has been considered and the brief of appellants examined with reference thereto, and we are of the opinion that the motion should be, and it is, denied.

[1]Reported in 201 Pac. 297.

This case is a sequel of *Buchanan v. Schubach,* 106 Wash. 399, 180 Pac. 407, where some of the history of the controversy still existing between the present parties may be found. That was a suit on a note and to foreclose a real estate mortgage, wherein the obligors attempted to show that they had been released from their obligation by the promise of Alpha L. Corman to pay the note and mortgage upon her taking title to the property subsequent to the date of the mortgage. The result of that suit was a judgment of foreclosure of the mortgage and a decision that there had been no substitution of Miss Corman in the place of the original makers of the note and mortgage, for the purpose of the deficiency judgment or at all. The judgment was affirmed by this court. During the pendency of the appeal therein, the property was sold on a special execution for the sum of $1,600. The sale was confirmed and a deficiency judgment entered in favor of the plaintiff therein and against the defendants, Schubach and wife and Bollong and wife, the makers of the note and mortgage.

Upon the going down of the remittitur of this court in that case, Bollong and wife, on November 18, 1919, paid, as they were compelled to do, the sum of $3,507.28 in full satisfaction of the deficiency judgment which had been entered against them, their joint judgment debtors, Schubach and wife, having been in the meantime judicially declared to be bankrupts. Prior to the payment by Bollong and wife of the deficiency judgment, Miss Corman, as owner, redeemed the property from the execution sale. Now, Bollong and wife, alleging those facts, and that the sole consideration for the sale to Miss Corman was her promise to pay the note and mortgage; that they were compelled to pay the deficiency judgment and $1,789, costs and expenses of litigation in the *Buchanan* suit, all of which Miss

Corman refuses to pay, and that the other defendants have acquired some subsequent and inferior interest in the property, have sued to recover judgment against Miss Corman in the amount they have necessarily expended, together with interest thereon; to be adjudged subrogated to the rights of Buchanan so as to resell the property redeemed by Miss Corman; and declaring the rights of the other defendants to be subordinate. By separate answers the defendants, Miss Corman and Smith and wife, denied material allegations of the complaint, and affirmatively plead that the plaintiff was estopped by the judgment in the *Buchanan* case from maintaining the present action. Miss Corman's answer admits she bought the property knowing the mortgage was outstanding. Replies put the affirmative matter of the answers in issue. At the close of plaintiffs' case on the trial, the court sustained a challenge to its sufficiency and dismissed the action. Plaintiffs have appealed.

Altogether there are fifty-five assignments of error, consisting largely of matters relating to evidence, all of which may be disposed of more generally.

In the first place, the complaint states a cause of action. It is well established law that "a verbal contract by the grantee of mortgaged premises to assume the mortgage thereon is enforcible as a contract independent of the deed of conveyance and additional to it, which is not merged in the executed deed, and therefore does not fall within the rule forbidding the introduction of parol testimony to vary, alter or add to a written contract." (Syllabus.) *Ordway v. Downey,* 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892. It is just such a case that the appellants present here. It may be there is enough testimony already in the record to *prima facie* show that Miss Corman did promise to pay the mortgage, but certainly the court erroneously

sustained objections to questions, struck out testimony that was admissible and important, and refused offers of proof sufficient to abundantly establish the promise. One DeBritz represented the Bollongs in selling the property to Miss Corman. While he was being examined on behalf of the appellants he was asked: "What did Miss Corman pay the Bollongs or Schubachs for the property, if anything?" Upon his answering: "She didn't pay anything, she assumed the mortgage," the answer was upon motion of respondents stricken by the court, upon the ground that it was a mere conclusion. Again, the following of the same witness:

"Q. Did Miss Corman give to the vendors in this transaction any consideration, by way of money, property, or anything else? Mr. Foster: That is objected to, if your Honor please. It asks strictly for the opinion of the witness; his conclusions predicated upon some things that is not before the court. The Court: Objection sustained. Mr. Griffin: Note an exception. Q. What was the consideration for this transferring of the property from the Bollongs to Miss Corman? A. The assumption of this mortgage by the grantee. Mr. Foster: I move that be stricken. The Court: Grant the motion."

Time and again the same or similar questions were asked of the witness with the same result. Several witnesses were asked with reference to admissions claimed to have been made by Miss Corman relative to her agreement to pay the mortgage, such as the examination of Mrs. Bollong, one of the grantors, as follows:

"Q. Mrs. Bollong, did you ever have a conversation with Miss Corman relative to this note and mortgage? A. Yes, sir. Q. What did Miss Corman say to you, if anything, at that time relative to her assumption of the note and mortgage? Mr. Foster: That is objected to as being incompetent, irrelevant and immaterial for any purpose. The Court: Objection sustained. Mr. Grif-

fin: Note an exception. Q. In the original foreclosure of this note and mortgage, in which you were joined as defendant with Miss Corman, did you have a conversation with Miss Corman relative to paying this note and mortgage? A. Yes, sir. Mr. Foster: I object to that as being incompetent, immaterial and irrelevant, for any purpose. The Court: Objection sustained. Exception allowed. Q. Did Miss Corman in any of those conversations tell you what occurred when she purchased this property? A. Yes, sir. Mr. Foster: I object to that as being immaterial. The Court: Objection sustained. Exception allowed."

Thereafter the appellants made a formal offer to prove all the matters suggested by all the questions mentioned above, and other proof of a similar sort, and that she took the property without any consideration to the grantors except her promise to pay the note and mortgage, and that subsequently she had so admitted. The offer was objected to by the respondents "on the ground that it is incompetent, irrelevant and immaterial." The objection was sustained. We are not apprised by the record, including the briefs and oral arguments of counsel for the respondents, of any reason for the rulings, unless possibly the contention or claim by respondents of former adjudication alleged to have been had in the *Buchanan* case, but certain it is that all the rulings referred to, and others of a similar sort, rather too numerous to be set out herein in detail, were erroneous.

No reasons were given by the trial court for granting the nonsuit. At the end of plaintiff's proof the record shows, as follows: "Mr. Foster: I now challenge the sufficiency of the evidence, and move for a nonsuit. The Court: Grant the motion. Mr. Griffin: We take an exception to the ruling." It is argued by the appellants that the court's conclusion was based largely upon the contention of the respondents that

the appellants were estopped by the judgment in the *Buchanan* case. Indeed, counsel for respondents in their brief and orally argue here, "The complaint simply asks for a readjudication of a matter already adjudicated"—referring to the *Buchanan* case. But we cannot agree that there has been a former adjudication. A consideration of the pleadings in this case, together with the pleadings, findings and decree in the *Buchanan* case, warrant us in so holding. In that case, while these appellants and Miss Corman were codefendants therein, neither filed any cross-complaint or tendered to the other any issue whatever. They were not litigating with each other, but each defending against the suit of the plaintiff therein. The relative rights of these appellants and Miss Corman were not determined in that case, nor was it necessary to do so, nor could they be under the issues in that case. The theory of that case on the part of the Bollongs was simply that there had been, with the consent of the holder of the note and mortgage, a substitution of Miss Corman as obligor and the release of the makers of the note and mortgage to pay it. That such was the case is clearly shown by the decision in *Buchanan v. Schubach, supra,* wherein this court found it unnecessary to discuss and refused to discuss the relative rights between Miss Corman and the makers of the note and mortgage. That that case did not adjudicate the matters now in issue between the Bollongs and Miss Corman appears too plain to merit discussion or the citation of authorities.

In this connection, the contention made by the appellants that they are entitled in this case to recover the $1,789 expended by them in the *Buchanan* case is without merit. Objections were properly sustained to questions on that subject. That amount was expended

by them in a fruitless effort to show that the holder of their note and mortgage had made a contract by which they were released from the payment.

As the appellants were compelled to pay the deficiency judgment they alleged Miss Corman agreed with them that she would pay, we are earnestly urged, upon a reversal of the judgment herein, to pass upon claimed rights of the appellants to be subrogated to the rights of Buchanan under the judgment in that case, for the purpose of a resale of the mortgaged property redeemed by Miss Corman, and also to determine the rights of the appellants as against other defendants in this case who it is alleged are claimants of some junior interest in the property. Those questions however are not involved in the appeal. They are questions of law that become pertinent only when the facts alleged in the complaint are established against Miss Corman, and will be decided by the trial court at the proper time.

Reversed.

PARKER, C. J., HOLCOMB, MAIN, and TOLMAN, JJ., concur.

[No. 16467. *En Banc.* October 15, 1921.]

C. B. W. RAYMOND, *Respondent*, v. KING COUNTY *et al.*, *Appellants.*[1]

TAXATION (107)—PERSONAL PROPERTY—LIEN—TRANSFER OF PROPERTY—STATUTES—CONSTRUCTION. Rem. Code, § 9235, providing that taxes assessed upon real and personal property cannot be affected in any way by sale or transfer of the property, must be construed as inapplicable with respect to personal property, in view of Rem. Code, § 9223a, which provides for the collection of delinquent personal property taxes by distraint of "sufficient goods and chattels belonging to the person charged with such taxes to pay the same."

Appeal from a judgment of the superior court for King county, Hall, J., entered April 4, 1921, in favor of the plaintiff, in an action to enjoin the enforcement of a personal property tax, tried to the court. Affirmed.

Malcolm Douglas and *Wm. Parmerlee*, for appellants.

C. M. Fouts and *Alexander, Bundy & Swale*, for respondent.

FULLERTON, J.—For some years prior to the year 1920, and until October 6 of that year, the Page & Bolster Shingle Company was engaged, in King county, in the business of manufacturing lumber and shingles. On the specific date given, the company was, at the suit of certain of its creditors, adjudged insolvent and placed in the hands of a receiver. At the time of the appointment of the receiver, the company owned, and had in its possession with other property, some 312,000 feet of lumber, which had been manufactured by it in the earlier part of the year 1920. This lumber was sold by the receiver, on December 20, 1920, under the order of the court, to the respondent C. B. W. Raymond. In 1919, the Page & Bolster

[1]Reported in 201 Pac. 455.

Shingle Company owned certain other personal property on which a tax was assessed for that year in the sum of $120.20. The taxes were not paid, and after the sale of the lumber to the respondent, the sheriff of King county, under papers in distraint issued by the county treasurer, threatened to distrain and sell the lumber, or so much thereof as might be necessary to pay the taxes, with interest and costs. This action was thereupon begun by the respondent against the sheriff and the county treasurer to enjoin the threatened distraint. At the hearing a permanent injunction was entered, and the county officers appeal.

The statutes relating to the assessment and collection of taxes upon personal property are somewhat complicated, and to a certain extent confusing. While they perhaps contain no specific provision to that effect, they evidently contemplate that an assessment upon personal property is not only a lien upon the specific chattel assessed, but is a personal obligation of the owner of the chattel. With reference to the general lien of the tax, the statute contains this further provision, namely: (see Rem. Code, § 9235; P. C. § 6979).

"The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien of such taxes upon such property."

Invoking the language of this section, the appellants contend that a personal property tax, no matter when or upon what property assessed, becomes a lien upon all the personal property owned by persons charged with the tax, whenever or however acquired, and that the lien follows the property into whosesoever hands it may subsequently fall.

It is our opinion that this is not the legislative meaning. To give the statute the construction contended for would be to say that a chattel, by mere sales and deliveries, could be charged with a constantly increasing burden. If, to illustrate, a person charged with a tax and owning a specific chattel should sell and deliver the chattel to another, the chattel would not only remain charged with the personal property tax of the seller, but would become immediately charged with the personal property tax of the purchaser; and a like result would follow from all subsequent sales until the chattel could be chargeable with the entire delinquency in the county. It would be to say, moreover, under the rule that a person destroying a chattel on which there is a specific lien becomes personally chargeable with the lien to the value of the property destroyed, that the patrons of an ordinary grocer could be held for the grocer's personal property tax to the extent of their purchases of groceries from him. Effects, such as these, would be intolerable to the business world. It would prevent traffic in personal property. No one, without the most careful research, could purchase from another a specific chattel with the assurance that he was acquiring an unencumbered title thereto, or with the assurance, if he so used the chattel as to put it out of the reach of the tax collector, that he would not thereafter be called to account for the value of the chattel.

But we think the statutes themselves show that the contention made misconstrues the legislative intent. The statutes from the earliest time have contained provisions similar to the provision now in question, declaring that the taxes assessed upon personal property shall be a lien upon all of the real and personal property of the person assessed, yet the statutes declaring

the lien have uniformly provided that any levy upon personal property to enforce the lien shall be made upon the personal property of the person charged with the tax. (See Code of 1881, §§ 2882, 2903; Hills Code, §§ 1131, 1096; Code of 1896, §§ 3752, 3758, 3745; Bal. Code, §§ 1740, 1727; Pierce's Code, 1912 ed., title 501, §§ 181, 215; Rem. & Bal. Code, §§ 9223, 9235; Rem. Code, §§ 9223, 9223a, 9235; Pierce's Code, 1919 ed., §§ 6979, 6957, 6958.) As to the manner of collecting delinquent personal property taxes, the latest enactment of the legislature is found in the Laws of 1915, p. 370, ch. 137. It is there provided that, in the event the treasurer is unable to collect such taxes in due course, he shall prepare papers in distraint, which shall contain a description of the personal property, the amount of the tax, the amount of the accrued interest at the rate of fifteen per cent per annum from March 15 of the year succeeding the levy, and the name of the owner or reputed owner, and shall file the same with the county sheriff, "who shall immediately without demand or notice, distrain sufficient goods and chattels belonging to the person charged with such taxes to pay the same, . . ." Manifestly, we think, had it been intended that the levy could be made upon any property the person charged with the taxes at any time owned while so charged, it would have been so stated in express terms, and the specific provisions, prescribing upon what property the levy should be made, would not have been so framed as to exclude the idea.

In none of our adjudicated cases has the precise question been determined. The decisions most nearly in point are *Mills v. Thurston County*, 16 Wash. 338, 47 Pac. 759; *Klickitat Warehouse Co. v. Klickitat County*, 42 Wash. 299, 84 Pac. 860, and *Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578, where we held that

taxes levied upon specific chattels followed the chattels into the hands of purchasers purchasing from persons who were owners at the time the taxes were levied. The soundness of these decisions seems to have been questioned in the later case of *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667. But, be this as it may, the principle of the cases is not applicable to the present situation. A purchaser can protect himself against taxes levied upon a specific chattel, but he cannot do so as against a general lien such as is here contended for.

The judgment will stand affirmed.

PARKER, C. J., HOLCOMB, TOLMAN, MACKINTOSH, MITCHELL, BRIDGES, and MAIN, JJ., concur.

[No. 16410. Department Two. October 15, 1921.]

UNITED RAILWAY & LOGGING SUPPLY COMPANY, *Respondent*, v. SIBERIAN COMMERCIAL COMPANY, *Appellant*.[1]

BILLS AND NOTES (34)—TRADE ACCEPTANCES—NEGOTIABILITY—TIME OF PAYMENT—HOLDER IN DUE COURSE—STATUTES. A trade acceptance reciting "on December 1, pay to the order of G. W. Laing," is incomplete so far as fixing date of payment, and hence constitutes a non-negotiable instrument against which the drawee has a right to defend, in view of Rem. Code, § 3443, which defines a holder in due course as "a holder who has taken the instrument under the following conditions: (1) that it is complete and regular on its face."

SAME. Where a trade acceptance attempts to fix, without completing, the statement of time of payment, it does not come within the definition of Rem. Code, § 3398, declaring an instrument is payable on demand ". . . (2) in which no time of payment is expressed."

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 20, 1920,

[1]Reported in 201 Pac. 21.

upon findings in favor of the plaintiff, in an action on trade acceptances, tried to the court. Reversed.

C. H. Hanford, for appellant.

Reynolds, Ballinger & Hutson and *Elmer W. Leader*, for respondent.

MAIN, J.—This action was brought to recover upon two written instruments called trade acceptances. The trial resulted in findings of fact, conclusions of law, and a judgment sustaining the right to recover. The defendant appeals. The trade acceptances were drawn on August 1, 1919, and delivered on or about the same date. In attempting to fix the due date in one it is recited: "On December 1, pay to the order of G. W. Laing." In the other recital is the same, except that November 1 is mentioned. In neither is the year specified. The acceptances were drawn by one G. W. Laing and were accepted by the appellant. They were subsequently transferred by Laing to the Ballard Lumber Company, and from that company to the respondent. The appellant sought to interpose a defense which he would not have a right to make against one holding them in due course as was the respondent, if they are in fact negotiable instruments.

The controlling question then is whether the failure to fill in the year in an attempt to specify the due date renders them nonnegotiable. The respondent takes the position that the omission of the year may be viewed in one of two ways, either the time of payment is certain, or that no time of payment is fixed in the instruments and they are therefore payable on demand. According to the negotiable instrument law, § 3398, Rem. Code (P. C. § 4078), "an instrument is payable on demand . . . (2) in which no time of payment is expressed." By § 3443 (P. C. § 4123), "a

holder in due course is a holder who has taken the instrument under the following conditions: (1) that it is complete and regular on its face . . .'' Those sections being both embodied in the negotiable instrument law, it is necessary to give effect to each. According to the section last quoted, a holder in due course must be one who has taken an instrument which is complete and regular on its face. As above stated, in one of the trade acceptances, in attempting to fix the due date, only December 1 is mentioned, and in the other November 1. In each case there was an attempt to fix a due date and it was not completed by reason of the fact that the year was omitted. In *In re Philpott's Estate,* 169 Iowa 555, 151 N. W. 825, the court had before it a note which provided that it was payable ''on or before 4—— after date.'' The question there arose, under a similar provision of the statute, whether the note was complete and regular upon its face, and it was held not to be so. There was an apparent attempt to fix a due date but it was not complete, owing to the fact that it did not specify whether it was payable four days, four months or four years after date. In the course of the opinion it was said:

''This note was not 'complete and regular' upon its face. It indicated upon its face that some word had been omitted in an attempted specification of the time of payment . . .

''If the real intent of the parties in interest was to make this instrument payable in four years, it may be that the payee could have lawfully corrected the oversight by inserting the word 'years'; and it may be also that this would have rendered the note negotiable to a holder in due course as defined in the section above quoted. The question in that form is not now before us and we need not pass upon it. We think it quite clear that this irregularity upon the face of the note pre-

vented its taker from becoming a holder in due course. It could be deemed a demand note, unless the agreement of the parties was in fact otherwise. If otherwise, such fact was suggested by the incompleteness of the terms actually used.

"The controlling fact at this point is, not that the blank was not filled, but that it *was filled imperfectly* or irregularly. Though we grant that the note was presumptively good as a demand note, yet it was not 'complete and regular' within the requirements of section 3060-a52, and therefore was not negotiable."

It is true that the omission in that case was not the same as in the present case, but in each case there was an attempt apparent upon the face of the instruments to fix a due date, and in each case there was an omission. Were it not for the section of the statute requiring a holder in due course to be one who has taken an instrument complete and regular upon its face, it may be that the instruments here in question would be deemed to be payable on demand, but where there is an attempt to fix a due date which is not complete, it would seem only reasonable to hold that the instrument is one not complete and regular on its face and the section of the statute requiring it to be such would prevail. In the case of *Collins v. Trotter,* 81 Mo. 275, the question was whether a note which was payable on the "first day of March," omitting the year, was payable on demand and therefore negotiable, and it was there held to be such. But that case is rested upon the law merchant and makes no mention of a requirement that a holder in due course must be one who has taken the instrument which is complete and regular upon its face. In view of the statutory requirement embodied in the negotiable instrument law, that case cannot be considered to be in point. In Selover, Negotiable Instruments (2d ed.), p. 65, it is stated that an instrument payable on the "first day of March," without mention-

ing the year, is payable on demand, but in support of the text only the case of *Collins v. Trotter, supra,* is cited.

Since the trade acceptances were not complete and regular on their faces, the appellant had a right to defend against them as non-negotiable instruments.

The judgment will be reversed and the cause remanded.

PARKER, C. J., MACKINTOSH, and MITCHELL, JJ., concur.

[No. 16497. Department Two. October 15, 1921.]

PUGET SOUND POWER & LIGHT COMPANY (*formerly named Puget Sound Traction, Light & Power Company*), *Appellant,* v. THE CITY OF SEATTLE *et al., Respondents.*

THE CITY OF SEATTLE, *Appellant,* v. PUGET SOUND POWER & LIGHT COMPANY *et al., Respondents.*[1]

TAXATION (105)—PERSONAL PROPERTY—LIEN ON REAL PROPERTY. A personal property tax against a taxpayer casts no cloud upon his real estate until the county treasurer, acting under authority of Rem. Code, § 9245, selects specific real property and charges it with the lien of the personal property tax.

SAME (222)—EQUITY (78)—ENJOINING COLLECTION OF TAX—DECREE—PLEADINGS AND ISSUES. In an action by a street railway company to restrain the collection of taxes on property sold by it to a city and to have the tax cancelled as a cloud upon the title to other real property, in which the city as defendant admitted the allegations of the complaint, and in a cross-complaint alleged essentially the same facts and prayed for the same relief, there was no issue between the company and the city as to the apportionment of the tax if valid, and the court was not required to adjudicate the portions due respectively from each.

SAME (105, 107)—PERSONAL PROPERTY—LIEN—WHEN ATTACHES—TRANSFER OF PROPERTY. Under Rem. Code, § 9235, providing that

[1]Reported in 201 Pac. 449.

taxes assessed on personal property shall be a lien from the date of assessment, a municipality which acquires a street railway property by purchase subsequent to the time such lien attaches takes the property, like an individual, subject to the lien of such tax.

STATUTES (24)—SUBJECTS AND TITLES—TAXATION—ASSESSMENT OF RAILROAD PROPERTY. The word "railroad" in the title of an act for the assessment of the operating property of railroads (Laws 1907, p. 132, ch. 78, and the amendatory act, Laws 1911, p. 62, ch. 21) which, in accordance with modern usage, generally covers street railways, is defined by the act itself (Laws 1907, ch. 78, § 2, subd. 6) as including street railways, and therefore the title is broad enough to cover the assessment of street railway property.

TAXATION (71)—EQUALITY AND UNIFORMITY—STREET RAILROADS—MODE OF ASSESSMENT. Laws 1911, p. 62, ch. 21 (amending § 12 of Laws 1907, ch. 78), providing that "all the operating property of street railroads shall be assessed and taxed as personal property," does not, by the inclusion of both real and personal property under the classification "operating property," violate either the equal protection clause of the Federal constitution or the uniformity of taxation sections of the state constitution, inasmuch as the classification of property for assessment is a matter of legislative policy, provided uniformity and equality exist in the classes.

SAME (71) — RAILROAD PROPERTY — ASSESSMENT — PROCEEDINGS—POWERS OF TAX COMMISSIONER—STATUTES—DIRECTORY OR MANDATORY PROVISIONS. The fixing of the assessment of street railway property by the tax commissioner, prior to the filing of reports by a railway company as enjoined by statute, was not violative of the equal protection and due process clauses of the Federal constitution, since its duty to make report was directory and not mandatory upon the tax commissioner.

Appeals from a judgment of the superior court for King county, Allen, J., entered December 10, 1920, in favor of the defendants, in an action to enjoin the collection of a tax, tried to the court. Affirmed.

James B. Howe, Hugh A. Tait, Edgar L. Crider, and *Norwood W. Brockett,* for appellant Puget Sound Power & Light Company.

Walter F. Meier and *Edwin C. Ewing,* for appellant City of Seattle.

Malcolm Douglas and *Howard A. Hanson,* for respondent King County *et al.*

MITCHELL, J.—The city of Seattle purchased from the Puget Sound Traction, Light & Power Company a street railway "system, property and equipment." The purchase was authorized by ordinances of the city duly approved by the mayor. The actual transfer of the property was effected by an instrument dated and delivered March 31, 1919, and a physical delivery of the property the same day. The conveyance contained in its provisions the following:

"It is also further agreed between the parties hereto that if at the time of the delivery of this deed any lien shall have attached to the property or any part thereof for the year 1919 for any tax for the year 1919, such lien shall not constitute a breach of warranty, and that if such tax shall become collectible the same shall be paid before the same shall become delinquent by the respective parties hereto in amounts proportional to the respective periods of time that the same parties are respectively in possession of said property during the year 1919."

On or after March 15, but prior to March 31, 1919, the state tax commissioner assessed that portion of the property of the company afterwards transferred to the city. The validity of that assessment is the one involved in this suit. It covered operating property and consisted of a substantial amount of real property, but more largely of personal property, and was assessed *in solido* as personal property. Subsequently the company unavailingly protested against the assessment to the state tax commissioner, and also before the state board of equalization, that the property was exempt from taxation. The assessment was in due time certified to the assessor for King county. Taxes were levied thereon and the county treasurer gave notice of his demand for the personal property taxes for the year 1919.

The company instituted this action to restrain the collection of the taxes and to have the same declared null and void and cancelled as a cloud upon the title to other real property belonging to the company. The city was made a defendant. The complaint prayed that, if the taxes be upheld, the judgment should require the city and the company to pay each its proportionate part in accordance with the agreement between them. The company alleged that the property became public property before any lien for taxes attached. The city admitted the allegations of the complaint and filed a complaint alleging essentially the same facts as the company and praying for the same relief. The county and its tax officers, who were the adversary defendants, admitted that the property was assessed as alleged, and claimed it was properly assessed by the state tax commissioner on March 15, 1919; that, at that time, the lien for taxes attached; and that when the city acquired title on March 31, 1919, it did so subject to the lien.

The superior court gave judgment in favor of the county and its officers, against both the company and the city, and declined to adjudicate the relative rights and obligations of the company and the city to an apportionment of the taxes under the terms of the contract of conveyance between them. The company and the city have appealed.

The contentions of both appellants are similar. In the company's brief it is claimed of assignments 1 and 2 that, if the property upon which respondents claim a lien was not subject to such lien, the alleged tax would constitute a cloud upon the title, and if it was subject to such lien, since appellants had contracted with each other to divide it, the court should have adjudicated their respective portions. The propositions are not made clear by argument. If by the first it is meant that the tax, being a personal property tax in the name

of the company, thereby casts a cloud on the title of real property the company still owns, the answer is that, by § 9245, Rem. Code; P. C. § 6952 (considered in *Scandinavian American Bank v. King County,* 92 Wash. 650, 159 Pac. 786), no such cloud can be cast until the county treasurer selects specific real property and charges it with the lien of the personal property tax. If it is meant that the cloud is cast upon the property assessed, then the answer is to be found in the disposition of the other assignments with reference to the validity of the tax. On the other point—apportioning the tax between the company and the city—it is claimed "equity having acquired jurisdiction, it was error on the part of the superior court not to adjudicate the entire matter." But the pleadings in the case show that no issue was formed upon the subject. If the taxes are paid without sale the respondents care not how the amount may be divided if more than one person pays them, and between those parties their pleadings in this respect are identical. They present no controversy with each other; there is nothing to adjudicate.

Next it is claimed that the property sold and delivered to the city was not subject to assessment or taxation for that year. In considering this assignment we assume for the moment that the assessment was made at a proper time by the proper officer, and that all the property was for such purpose properly classified as personal property, which will be later discussed herein. Appellants rely on art. 7, § 2, of the state constitution, and subd. 2 of § 9098, Rem. Code (P. C. § 6891), to the same effect. The constitutional provision is:

"The property of the United States and of the state, counties, school districts and other municipal corporations, and such other property as the legislature may

by general laws provide, shall be exempt from taxation."

Section 9235, Rem. Code (P. C. § 6979), enacted in 1903, provides:

"The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, . . . The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed from and after the day upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property."

As to the lien, the statute lays down one rule for real property and another for personal property. That, of course, is a matter of legislative policy, unimportant to the courts except as necessity arises to keep the difference clearly in mind. That difference is pointed out in the case of *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667. It was a case in which real property was sold to the state after it had been assessed, but prior to the levy for that year. It was pointed out that, in giving a lien for a real estate tax, the statute contemplates a levy as well as an assessment, while as to personal property, only an assessment is required; and it was decided that, as the levy had not been made at the time of the purchase, the state took the real property free of any lien for taxes. In the opinion the court said:

"We are not blind to the fact that a contrary view finds apparent support in the decisions of this court in *Klickitat Warehouse Co. v. Klickitat County*, 42 Wash. 299, 84 Pac. 860, and *Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578. Those cases, however, construe only that part of the lien statute relating to taxes on personal property. . . . The lien is thus by statute made complete, perfect, and enforcible prior to the levy for

the current year. Every purchaser of personal property subsequent to the assessment, therefore, takes subject to a perfected and indestructible lien. No such provision for acceleration and computation is found as to real property taxes. The lien as to them is inchoate and unenforcible until the tax has been fully imposed by the levy for the current year."

The case of *Puyallup v. Lakin,* just referred to, was one in which the court was asked to overrule the decision in the former case of *Klickitat Warehouse Co. v. Klickitat County,* holding that the lien attaches at the date personal property is assessed, but refused to do so, and specifically decided that the city of Puyallup, in purchasing a water plant after it had been assessed for taxation purposes but prior to the levy that year, took the same subject to the tax, and that the lien was not divested by devoting the property to a public use prior to the levy, stating:

"If the property had a lien upon it when it was purchased by the municipality, the municipality like an individual would take the property subject to the lien."

It is claimed the *Puyallup* case was, in effect, overruled by *Gasaway v. Seattle,* 52 Wash. 444, 100 Pac. 991. We do not so understand. It was a case in which the plaintiff sought to foreclose certificates of delinquent taxes upon lands condemned by the city that had paid the condemnation awards into court and the property was now devoted to a public use by the city. In the course of the opinion it was said:

"In *Puyallup v. Lakin, supra,* the property was purchased under a contract. The law of eminent domain and the special statute upon which this case rests were not under consideration. The city had the right of contract and, in the absence of any law exempting it from the burdens of its trade, it was bound to meet them. The difference between that case and this is that the one rests in simple contract, the other is sustained by

the sovereign power of the state. We are unwilling to extend the doctrine announced in the *Puyallup* case."

That is, there is a clear distinction between those cases where the city has acquired property by private treaty as compared with those cases where it has been acquired by condemnation—the one voluntary, the other involuntary. And the reasons for the difference are easily ascertained and shown by the decisions. Prior to the present statute creating a lien for taxes upon personal property from the date of the assessment, it was common knowledge that, under the former statutes, where personal property was listed in one year and the lien for taxes did not attach until the following year, large amounts of personal property changed hands or were removed from the county after the assessment and before the levy attached, and the taxes could not be collected. For this reason the state adopted its present policy. It is otherwise with real property, and particularly so as to the rights of all parties, including a lien for taxes, where the condemning party pays into court the amount of the award, whereupon a proper apportionment of the fund between the owner and any other having an interest therein or a lien thereon can be had by timely application to the court making the award. In the case of the disposition of personal property no such protection is afforded, and in such case, "if the property had a lien upon it when it was purchased by the municipality, the municipality, like an individual, would take the property subject to the lien." *Puyallup v. Lakin,* 45 Wash. 368, 88 Pac. 578; "The city had the right of contract and, in the absence of any law exempting it from the burdens of its trade, it was bound to meet them." *Gasaway v. Seattle,* 52 Wash. 444, 100 Pac. 991; "Every purchaser of personal property subsequent to the assessment, therefore, takes subject to a perfected and

indestructible lien." *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667.

It is further contended that the statutes under which the state tax commissioner acted are void as to the assessment of street railway property because the subject-matter is not within the titles of the acts. The acts are Laws of 1907, p. 132, ch. 78, entitled "An act to provide for the assessment of the operating property of railroads" and Laws of 1911, p. 62, ch. 21, entitled "An act to amend section 12, of chapter 78, Laws of 1907, relating to the assessment of the operating property of railroads, approved March 6, 1907, and declaring an emergency." There is a mountain of authority upon this subject, and scores of pages and cases are supplied us by counsel in their several briefs in this case. One can well understand how that in almost ancient days the word "railroad" did not convey to the common mind the idea of a street car drawn by a horse or a mule. But in the development of transportation facilities leading to the use of electricity and other power than steam, systems have been long since established, often connecting different cities, which, together with the change by which for the purpose of equality of taxation all such operating properties are assessed by state rather than county officers, have caused the term to gradually broaden, so that ordinarily the meaning of the word is not so restricted as formerly. That such is the case is illustrated by the acts of the legislature of this state, for in 1905, ch. 81, p. 145, in providing for a railroad commission the legislature found it necessary to declare that the terms road, railroad, railroad company, railroad corporation shall not apply to street railroads, electric railroads, or suburban or interurban railroads. Again, Laws of 1907, ch. 41, p. 57, in granting additional authority to cities of the first class to authorize the location, construction and operation of

railroads in, along, over or across highways, streets and public places, etc., it was deemed cautious to provide therein that the act should not be construed as applying to street railroads, etc. It was this same legislature that enacted ch. 78, p. 132, to provide for the assessment of operating property of railroads, wherein for the purposes of the act certain terms were defined (a common practice in modern legislation). Subdivision 6 of § 2 declares that the word "railroad" or words "railroad company" shall be considered for all purposes of assessment and taxation as including street railways, suburban railroads or interurban railroads, etc. In this case both sides quote from the case of *Omaha & Council Bluffs Street R. Co. v. Interstate Commerce Comm.*, 230 U. S. 324, 57 L. Ed. 1501. In that case it was said:

"The appellants cite decisions from twelve states holding that in a statute the word 'railroad' does not mean 'street railroad.' The defense cite decisions to the contrary from an equal number of states. The present record discloses a similar disagreement in Federal tribunals. For not only did the Commerce Court and the Circuit Court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Wilson v. Rock Creek Ry. Co.*, 7 I. C. C. 83."

And further in the same case it was said:

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'Railroad' will include Street Railroad. On the other hand, if the act was aimed at Railroads proper, then Street Railroads are excluded from the provisions of the statute."

The cases arise where the word or words are used in the body of statutes, and the apparent conflict is easily

accounted for by reference to the rule of statutory construction requiring observance of the context of the act and the manifest intention of the legislature—that is, the character of the statute and the purpose for which it was enacted. In the recent work, 22 R. C. L. 745 (railroads), it is said:

"The courts have held that the term 'railroad' is broad enough to include a street railway. Indeed, it seems that the words 'railroad' and 'railway' used in statutes will be held to apply to both commercial railroads and street railways, unless there is something to indicate the particular kind intended. Of course, though, by well settled rules of statutory construction, where it is sought to bring a particular line within the statutory scope of either of these two words, the controlling factor is the legislative intent. In accordance with that intent the line must be included or excluded."

The situation is illustrated by the case of *Front Street Cable R. Co. v. Johnson,* 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693, cited and relied on by the appellants, wherein the word railroad was held not to mean street railroad, of which 1 Elliott, Railroads (2d ed.), § 6, p. 14, in a note, properly says it was the case of a statutory lien extended to the land, and, as the street railway company did not own the fee, this was the principal reason for holding the statute inapplicable.

Concerning the relation of the title of an act to its object, we have uniformly held that the title is sufficient if the object is fairly embraced therein and that it need not be a complete index thereof. In the very late case of *Fisher Flouring Mills Co. v. Brown,* 109 Wash. 680, 187 Pac. 399, former decisions of this court were reviewed to the effect that sound public policy and legislative convenience require a liberal construction of this provision of the constitution; that it has to do with legislative procedure and not with those guarantees of personal rights which it is the peculiar prov-

ince of the courts to protect. We think that street railroads were and are fairly included in the term "railroad" as used in the titles of the acts, and certainly such was the intention of the legislature as manifested by the express language of the statutes.

In the amendatory act of 1911 it is provided "that all the operating property of street railroads shall be assessed and taxed as personal property." It is contended by the appellants that this plan violates both the constitution of the state and the fourteenth amendment to the constitution of the United States. The provisions of the respective constitutions invoked are those pertaining to the equal protection of the laws, a uniform and equal rate of assessment and taxation on all property in this state, and § 3, art. 7, of the state constitution, which latter is as follows:

"The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property."

That there might arise a necessity for or the advisability of some different method in detail was contemplated and provided for by the constitution. Uniformity and fairness are the results to be achieved. In this case there is no question as to the amount of the assessment. In the trial, counsel for the company said: "We are not raising any point as to the valuation, but we are taking the position that the property which is on the tax roll and on which we are assessed includes the value of all the operating property, real and personal." It was decided in *Moeller v. Gormley*, 44 Wash. 465, 87 Pac. 507, that a lease of real property for thirty years was properly taxed as real property under the then existing statute. Thereafter (1907) the law was changed and provided that all leases of real property and lease-

hold interests therein for a term less than the life of the holder should be assessed and taxed as personal property, and in the case of *Metropolitan Building Co. v. King County,* 62 Wash. 409, 113 Pac. 1114, Ann. Cas. 1912C 943, this court said: "We are bound by the statute, therefore, to determine the value of the leasehold as personal property." There is no vested right, either in a corporation or natural person, to have property assessed in any particular way. Such matters rest entirely within the control and discretion of the legislature. *Heilig v. City Council of Puyallup,* 7 Wash. 29, 34 Pac. 164. It is a question of uniformity and equality in the classes. "The classification of property for assessment, where uniformity and equality exist in the classes, is a matter of legislative policy." *Ridpath v. Spokane County,* 23 Wash. 436, 63 Pac. 261. That there is ample reason for the classification made by the statute in this case is easily perceived. Street railways have no fee in the streets, their properties are largely personalty, while the commercial steam railways own their rights of way, and own extensive freight yards, terminal and station grounds.

That the statute providing for the assessment of the operating property, both real and personal, *in solido* does not violate the constitutional provision referred to is well sustained by the doctrine of *Northern Pac. R. Co. v. State,* 84 Wash. 510, 147 Pac. 45, Ann. Cas. 1916E 1166. In fact, the undisputed testimony in this case shows that this manner of assessment was specifically requested all prior years after and including 1914 by the tax agent of the traction company upon the score, as stated by him, that it saved work in his office.

One of the most exhaustive and instructive cases upon this subject is *Chicago & Northwestern R. Co. v. State,* 128 Wis. 553, 108 N. W. 557. It was contended in that case that the plaintiff's property was assessed

upon an unjust and different basis from that of other property, and particularly that of street railways and interurban railroads operated by electricity, and some other property, not belonging to railway companies, having to do with transportation of some sort, thus violating the constitutional rule of uniformity. But the supreme court of Wisconsin decided otherwise, saying: "The discretion of the legislature in this field is so broad that it is not competent for the court to mark the constitutional limitations of it other than at the farthest one might go without transcending all reason." That case contains a lengthy discussion of the subject and references to a large number of cases of the United States supreme court to show that this class of statutes does no violence to the fourteenth amendment to the Federal constitution, and "in general indicate that the Federal supreme court does not assume to deal with state laws, under the fourteenth amendment, that fall with any fairness within the field of classification." We are in accord with that view.

Lastly, it is contended that, even assuming the validity in all its parts of the statutes under which the assessment was made by the state tax commissioner, nevertheless the administration of the statute by that official in the manner followed by him in making the assessment denied to the company and the city the equal protection of the law and deprived them of property without due process of law, in contravention of the fourteenth amendment to the Federal constitution. It has already been noticed that the assessment was made prior to the date the city acquired the property. Section 5, ch. 78, p. 134, of the act of 1907, provides that every railroad company shall make and file with the board of state tax commissioners reports showing a number of enumerated facts concerning its business, property, capital and stock. Section 7 provides that

every such company shall be entitled, on its own motion, to a hearing to present evidence of any kind between the first day of April and the first day of May, relating to the value of the property of the company or to the value of the general property of the state.

In the present case the assessment was made on March 15, at which time the company had not filed its reports, and it is claimed that such reports are mandatorily required to be before the board to enable it to make a valid assessment under the law. However, there are other provisions of the act to be considered. Section 5 provides that the company shall make its report between January 1 and April 1 of each year; so that this company had already had the unimproved opportunity of two and one-half months to file its report prior to the assessment being made, and two months prior to March 1—the date arbitrarily fixed by statute for the commencement of the revenue and taxation year. Section 7 of the act provides: "The board, on or before the first day of March and the first day of June, in each year, according to their best knowledge and judgment, shall ascertain and determine the true cash value of the property of each railroad company within this state." At the date of the act the board of tax commissioners consisted of three members, but ch. 54, p. 210, Laws of 1917, created the office of state tax commissioner and gave him power and made it his duty to exercise all the powers and perform all the duties theretofore vested in and required to be performed by the state board of tax commissioners. It therefore appears that, if counsel's contention is correct that no assessment can be made by the tax commissioner until after the companies choose to send in their reports at the end of the time limited therefor by the statute, it would be almost, if not quite, impossible for the one commissioner to complete the assessments of the vast

amount of such properties in this state until long after the time fixed by the statute for the making of such assessments.

The reports, which may be sent in by the companies as early as January 1, must be considered as directory provisions of the statute only, so far as the power of the commissioner to make the assessment is concerned. Section 7, ch. 78, p. 137, Laws of 1907, provides: "Such hearing (before the commissioner) shall not impair or affect the right to a further hearing before the State Board of Equalization," which has power, "on application or of its own motion, to correct the valuation or assessment of the property of such company, in such manner as may in its judgment make the valuation thereof just and relatively equal with the valuation of the general property of the state." Section 10, ch. 78, p. 138, Laws of 1907. There is no complaint here that the amount of the assessment was too high. The valuation of the property taken for assessment purposes was much less than the value as fixed thereafter by the private contract between the company and the city when it was purchased. That such proceedings antedating the assessment, particularly those proceedings which are to be performed by the property owner, are directory and not mandatory upon the public authorities is well sustained by the cases. *Smith v. Newell,* 32 Wash. 369, 73 Pac. 369; *Coolidge v. Pierce County,* 28 Wash. 95, 68 Pac. 391; *County of Martin v. Drake,* 40 Minn. 137, 41 N. W. 942; *Torrey v. Millbury,* 21 Pick. (Mass.) 64; and 22 R. C. L. (taxation) 349. Nor does the procedure or plan of administering the law that was adopted by the commissioner in making the assessment in this case in any way violate the fourteenth amendment to the Federal constitution, or any guaranty contained in the state constitution. The pro-

cedure in no way affected the substantial justice of the tax itself, nor did it vitiate or in any manner affect the assessment. *Coolidge v. Pierce County, supra.* The doctrine and cases referred to in *Chicago & Northwestern R. Co. v. State, supra,* clearly applicable to the present case, meet all such contentions of the appellants.

Affirmed.

PARKER, C. J., MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

ON REHEARING.

[*En Banc.* June 12, 1922.]

PER CURIAM.—This cause was reargued before the court *En Banc* on May 22, 1922. Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of Department Two, the judgment is affirmed for the reasons therein stated and as therein directed.

[No. 16521. Department Two. October 15, 1921.]

In re Condemnation for SKAGIT RIVER POWER SITE. THE CITY OF SEATTLE, *Petitioner and Appellant,* v. BINGHAM INVESTMENT COMPANY, *Defendant and Appellant.*[1]

EMINENT DOMAIN (156)—APPEAL (406)—REVIEW—DISCRETION—NEW TRIAL FOR EXCESSIVE DAMAGES. The trial of condemnation proceedings by a city, including motions for a new trial, being governed, under Const., art. 1, § 16, and Rem. Code, § 7779, by the same rule as in other civil actions, the appellate court is confined to a determination whether the trial court abused its discretion in passing on the motion for a new trial.

APPEAL (72)—AFFECTING SUBSTANTIAL RIGHT—PARTIAL JUDGMENT. Where a motion for a new trial is based upon three grounds, the action of the trial court in passing on but one of the grounds in favor of the movant does not preclude such movant from the right of appeal as to the other grounds.

SAME (373)—REVIEW—THEORY—GROUNDS OF MOTION FOR NEW TRIAL. On affirmance of an order granting a new trial, the appellate court will not discuss additional grounds urged on the motion which were not passed upon by the trial court, in order to avoid making such grounds the law of the case on the new trial.

Cross-appeals from an order of the superior court for Whatcom county, Pemberton, J., entered January 6, 1921, granting a new trial, after the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

Walter F. Meier, Charles T. Donworth, and *Robert H. Evans,* for petitioner and appellant.

Thomas Smith and *Coleman & Gable,* for defendant and appellant.

MITCHELL, J.—The city of Seattle, by eminent domain proceedings, seeks to acquire title to land on the

[1]Reported in 201 Pac. 300.

Skagit river to be used in connection with the establishment of a hydro-electric light and power plant. The question of damages was tried to a jury, which returned a verdict in the sum of $27,500. The city contended the property was worth not to exceed $3,000, while the witnesses for the owner, Bingham Investment Company, valued it at from $17,000 to $50,000. The city moved for a new trial on the grounds: (1) Excessive damages appearing to have been given under the influence of passion and prejudice; (2) insufficiency of the evidence to justify the verdict and that the same is against the law; and (3) error in law occurring at the trial and excepted to at the time by the petitioner. An order was entered that a new trial be granted unless the owner should agree to accept $13,750. This the owner refused to do and a new trial was granted. In the order granting the new trial the court expressly found and stated that the verdict "is excessive in the sum of $13,750, and is the result of passion and prejudice against the petitioner, etc." The other grounds of the city's motion were in no way recited or specifically referred to in the order.

Both the property owner and the city have appealed —one contending a new trial was not authorized, and the other that it should have been granted upon all the grounds mentioned in its motion.

As we understand, the property owner contends the verdict of a jury is more binding upon the court in this kind of a case than in other kinds of civil actions. Upon the subject of compensation in eminent domain proceedings, art. 1, § 16, of the state constitution provides: ". . . . which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner provided by law." Under this mandate of the constitution, and

keeping within both its letter and spirit, the legislature has provided (§ 7779, Rem. Code; § 7556, Pierce's 1919 Code), in condemnation proceedings by cities, as follows: "Upon the return of the verdict the proceedings of the court regarding new trial and the entry of judgment thereon shall be the same as in other civil actions, and the judgment shall be such as the nature of the case shall require."

In the case of *Seattle v. Williams*, 41 Wash. 366, 83 Pac. 242—a condemnation suit by the city—after referring to the privilege or duty of the jury to fix by its verdict the amount of compensation, it was said:

"Having done so, and the appellants having moved for a new trial, it then became the duty of the trial judge to ascertain whether or not there were any reasons for setting aside such verdict. If he believed the verdict to be grossly inadequate, or that a fair legal trial was not had, he should have granted a new trial."

Again, in the case of *Renton v. Dykeman*, 61 Wash. 330, 112 Pac. 348—an eminent domain case—upon reciting the reasons given by the trial judge for refusing a new trial, this court said:

"This would be no reason for any interference with the verdict, unless he went further and was of the opinion that it was clearly contrary to the weight of the evidence."

We think there can be no serious question that, under the constitution and statute above referred to, the trial of this kind of an action, including the motion for a new trial, is similar to that in other civil actions, and as pointed out in the case of *Stimson Mill Co. v. Troxel*, 113 Wash. 108, 193 Pac. 213, the scope of our authority over motions for new trials is more limited than that of the trial court, being confined to a determination if the trial court abused its discretion in

passing on such a motion. In all those cases where a motion for a new trial does not have to be supported by affidavits, and where the witnesses have testified in person at the trial, the rule that the trial judge has peculiar advantages for the exercise of discretion is more specially applicable. With such ideas in mind, the record in this case consisting, among other things, of abstracts of the evidence and all other features of the trial prepared by both parties have been examined, from which it cannot be said there was any abuse of discretion in granting the new trial, although confined as it was to the one ground stated by the trial court.

A motion is made to dismiss the city's cross-appeal upon the ground that the order granting the new trial, being in favor of the city, precludes it from the right of appeal. The rule, however, is otherwise under the circumstances of this case. *Rochester v. Seattle, Renton & Southern R. Co.*, 75 Wash. 559, 135 Pac. 209; *Pierce v. Seattle Elec. Co.*, 83 Wash. 141, 145 Pac. 228; *Langley v. Devlin*, 87 Wash. 592, 151 Pac. 1134; *Parkhurst v. Elliott*, 103 Wash. 89, 173 Pac. 731.

But the cross-appeal becomes unimportant now upon our affirming the trial court's order granting a new trial upon the ground therein specified. The cases in this court just cited establish the doctrine that the practice of permitting a cross-appeal by a party in whose favor an order has been made granting a new trial upon a less number of grounds than were urged in the motion therefor is to sustain the order so as to save the necessity of further proceeding in the trial court or another appeal on the same record; and that this court will, in affirming the order, decline to discuss the additional grounds urged on the motion for the new trial, as they have not been passed upon by the trial court, which will not be hampered by those alleged

errors on the score that they have become the law of the case in the event they arise in the course of the new trial ordered.

The order appealed from is affirmed.

PARKER, C. J., TOLMAN, FULLERTON, and MAIN, JJ., concur.

[No. 16378. Department One. October 19, 1921.]

In the Matter of the Estate of MATILDA BREDL.[1]

EXECUTORS AND ADMINISTRATORS (10, 13)—RIGHT TO APPOINTMENT—QUALIFICATIONS. The preference right of the husband to appointment as administrator upon the community property upon the death of his wife, under Laws 1917, ch. 156, § 49, is forfeitable for fraud, where he procures his appointment with knowledge of the existence of a will by his wife, but falsely swears there is no will, with the intent of acquiring a greater share of the estate than he would be entitled to under the will.

SAME (13). While the preference right under statute to administer upon an estate is a valuable right, it is not an absolute right, and does not require that the court shall appoint one who has given evidence of dishonesty of purpose in seeking the appointment, or who in other respects has betrayed gross unfitness for the trust.

HOLCOMB, J., dissents.

Appeal from an order of the superior court for Lewis county, Reynolds, J., entered December 6, 1920, revoking letters of administration issued to a surviving husband and appointing another as executor of the estate, after a hearing before the court. Affirmed.

W. E. Bishop, for appellant.

J. H. Jahnke, for respondent.

FULLERTON, J.—On August 5, 1920, Matilda Bredl died in Lewis county, leaving an estate therein consist-

[1]Reported in 201 Pac. 296.

ing of a community interest in real and personal property, and leaving as her heirs at law her husband, Anton Bredl, and a son by a former marriage, Robert S. Bredl. On August 16, 1920, the husband applied for letters of administration on her estate, averring in his application that due search and inquiry had been made to ascertain whether the decedent had left a will and that none had been found. On the filing of the petition, letters of administration were issued to the applicant. On November 1, 1920, the son brought into court a will of the deceased, in which he was named as devisee of the decedent's interest in the estate, and as executor of the will. He petitioned the court to revoke the letters theretofore issued to the husband, admit the will to probate, and to appoint and confirm him as executor of the estate in accordance with the terms of the will. As grounds for refusing to appoint the husband as executor with the will annexed, he alleged that the husband had been guilty of fraud in procuring his appointment as administrator, in that he had notice and knowledge of the existence of the will at the time he applied for letters of administration and falsely swore that no will existed; and that he had been guilty of fraud in his administration of the estate, in that he had secured a false and fraudulent appraisal of the property of the estate in order to have the same set apart to him as a homestead. The husband contested the petition of the son, but asked as alternative relief, in case the will produced be proven to be the last will and testament of the deceased, that he be appointed as administrator with the will annexed. At the hearing the court revoked the letters issued to the husband, admitted the will to probate and appointed the son as executor of the estate. It made no direct finding on the question of fraud, but found that the husband had

waived his right to be appointed administrator with the will annexed, because he had not applied to be so appointed within forty days after the death of testatrix. The appeal is by Anton Bredl from this order.

On the ground upon which the court rested its judgment it may be doubtful whether the judgment can be sustained. The statute (Laws of 1917, ch. 156, p. 645, § 9) provides that an executor of a will having the will in his custody shall, within forty days after he receives knowledge of the death of the testator or testatrix, either present the will for probate to the court having jurisdiction, or present the will to such court with his written refusal to serve as executor thereof. It was shown that the son had this will in his custody at the time of the testatrix' death, having at all such times knowledge of the death, and did not produce the will into court within the forty-day period. Other things being equal, therefore, the son was as much guilty of a dereliction of duty as was the husband, and since the statute provides (Id., § 49) that a surviving spouse shall be entitled to administer upon community property notwithstanding any provision of the will to the contrary, if he be otherwise qualified, there would appear no very sufficient reason in support of the ground stated for preferring the son to the husband. But we think there was not an equal dereliction and that the judgment of the court is justified on that ground. There is no question that the husband had knowledge of the existence of the will at the time he applied for letters of administration and falsely swore to the contrary, and the evidence hardly leaves it in doubt that he acted with the deliberate intent of acquiring for himself a greater share of the estate than the terms of the will entitled him to acquire. The son was not equally guilty. While he, through ignorance of the requirement of the

statute, withheld the will longer than the statutory time, he made no false oath, nor did he attempt, deliberately or otherwise, to deprive the husband of his rightful share of the property of the estate.

The preference rights given by statute to administer upon an estate, while recognized as valuable rights, are not absolute. To administer an estate is to administer a trust, and the rule of the statute is not so hard and fast as to require the court to appoint one as an executor or administrator who has given evidence of dishonesty of purpose in seeking the appointment, or who has betrayed a gross unfitness in other respects to administer the trust, even though he have the preference right given by the statute. It is no answer to say that the law itself has thrown about the administration its own protection. No law can protect absolutely against dishonesty. In many instances it can do no more than punish, and this is not a recompense to those who have suffered by the dishonesty.

The order is affirmed.

PARKER, C. J., BRIDGES, and MACKINTOSH, JJ., concur.
HOLCOMB, J., dissents.

[No. 16647. Department Two. October 19, 1921.]

The State of Washington, *on the Relation of Barney Simon, Plaintiff,* v. The Superior Court for King County, *Mitchell Gilliam, Judge, et al., Respondents.*[1]

Appeal (492)—Decision—Reversal and Remand—Order Directing Appointment as Administrator. The delay by the trial court in the substitution of an administrator directed by the appellate court in place of acting administrators until the latter shall have fully settled their accounts constitutes error.

Executors and Administrators (165)—Compensation—Rate and Amount. Where a substituted administrator finds nothing more to do than make distribution of the estate, he is entitled to receive only nominal compensation.

Application filed in the supreme court August 1, 1921, for writs of mandamus and prohibition to compel the superior court for King county, Gilliam, J., to appoint relator as administrator of an estate and to prohibit further proceedings under a pretended accounting and settlement by the acting administrators. Granted.

Arthur C. Bannon and *Peters & Powell,* for relator.

Walter B. Allen and *Chadwick, McMicken, Ramsey & Rupp,* for respondents.

Hovey, J.—This is an application by the relator for writs of mandamus and prohibition directed to the superior court for King county. Upon a prior appeal in a case between the same parties, this court rendered judgment directing that the relator herein be appointed by the superior court as administrator of the partnership estate of Louis Levy, deceased, and Barney Simon. *Simon v. Levy,* 114 Wash. 556, 195 Pac. 1025.

[1]Reported in 201 Pac. 25.

The order of the superior court was not superseded and no stay was asked for, either from that court or this court, pending the appeal. In the meantime the administrators originally appointed had proceeded with the administration of the estate and now contend that the same is ready for distribution; and the trial court has declined to enter any order substituting the administrators until the administrators formerly appointed have fully settled their account, and has made his action dependent upon what the account develops.

In our opinion, the superior court was in error in adopting this method. The judgment of this court should have been followed without delay. *State ex rel. Smith v. Superior Court,* 71 Wash. 354, 128 Pac. 648; 4 C. J. 1233; *Galbreath v. Wallrich,* 48 Colo. 127, 109 Pac. 417.

The person vested by law with the conduct of an estate is primarily and of right the executor or the administrator, and the duty of discovering the assets of an estate and properly caring for the same is upon him. The present procedure of the superior court has deprived him of this opportunity.

The former opinion of this court made no reference to the action of the acting administrators pending the appeal, nor is it the intention at this time to disturb the same so far as they are regular and comply with the law.

The question of allowances for compensation of the administrator and his attorneys can be equitably adjusted by the superior court, and in case the new administrator should find nothing more to do than make distribution he should receive only nominal compensation.

It is our conclusion that the superior court forthwith appoint the relator as administrator of the partnership

estate of Louis Levy, deceased, and Barney Simon, and, upon his qualifying, that the superior court enter an order directing the former administrators to turn over to him all of the assets of the estate now in their hands, less such deductions for expenses of administration, including administrators' and counsel's fees, as shall be found proper.

The relator will recover costs from the respondents, Zelma Levy and Bernhard Levinson.

PARKER, C. J., HOLCOMB, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 16347. Department Two. October 21, 1921.]

ELLA P. CONLAN, *as Executrix etc., Appellant,* v. SPOKANE HARDWARE COMPANY, *Respondent.*[1]

WITNESSES (44)—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED—CORPORATION AS PARTY. Under Rem. Code, § 1211, excluding evidence by a party in interest of transactions had with a deceased person, where the personal representative of the latter sues or defends, an officer and stockholder of a corporation holding as lessee of the deceased cannot testify to an agreement whereby the deceased agreed to accept a lesser sum than that provided in the written lease as rental.

LANDLORD AND TENANT (12-1, 115)—LEASE—MODIFICATION—EVIDENCE—SUFFICIENCY. A modification of the rental charge under a written lease is sufficiently shown by evidence that the lessee would have ceased to do business as a going concern and been forced into insolvency if the rent had not been reduced, resulting in the loss of defendant as a tenant, of which facts the landlord had knowledge; and that payments were made for a smaller rental by checks indorsed "rent paid in full to date," which were accepted by the landlord without question until a disagreement arose between the parties over the terms of a renewal of the lease.

ACCORD AND SATISFACTION (4)—LANDLORD AND TENANT (102)—RELEASE OF LIABILITIES — REDUCTION IN RENTAL — CONSIDERATION —

[1]Reported in 201 Pac. 26.

MUTUAL PROMISES. An agreement to reduce the rent is supported by a valid consideration where a written contract of lease is modified by the substitution of an oral agreement for a lesser rental, and there were mutual promises made by one to pay, and by the other to accept, a lesser sum for the purpose of continuing the relation, which would otherwise be abrogated by reason of the inability of the lessee to pay the rental as originally agreed.

FRAUDS, STATUTE OF (51)—OPERATION—CONTRACTS PERFORMED. An oral contract modifying the terms of a written lease, whose term extends longer than one year, cannot be repudiated by either party after it has become an executed contract by performance.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered October 4, 1920, upon findings in favor of the defendant, in an action for rent, tried to the court. Affirmed.

McWilliams, Weller & Brown and *Ferris & Ferris*, for appellant.

Graves, Kizer & Graves, for respondent.

FULLERTON, J.—On February 1, 1910, one Celia M. Conlan, being then the owner of a certain lot in the city of Spokane, on which there was a store building, leased the same to the respondent corporation, Spokane Hardware Company, for a term of ten years, at a monthly rental of one thousand dollars, payable in advance on the first day of each and every month. The lease contained the usual covenants, one of which was that the failure to pay the rent reserved at the time it became due worked a forfeiture of the lease. The respondent entered into possession of the property pursuant to the authority conferred by the lease and occupied it during the entire term.

Shortly after the execution of the lease, the lessor sold and conveyed the leased premises to one Thomas F. Conlan, and Conlan, during the remainder of the term of the lease, stood as landlord to the respondent. The rental was not paid according to the conditions of

the lease. By the terms of the lease, the rental reserved amounted to the sum of $120,000. Of this sum the lessee actually paid $87,400; and these payments were not made as they became due, but usually in lesser payments during the months in which they accrued, and occasionally long after their accrual. No forfeiture of the lease was ever declared. In two instances, during the earlier part of the term, agreements in writing were entered into between the landlord and the tenant by which a lesser sum than the rent reserved in the lease was agreed to be paid and accepted in full for rentals for stated periods, and thereafter, so it is contended by the respondent, oral agreements were entered into, similar in their purport and effect to the written agreements, under which lesser sums were paid and accepted in full satisfaction of the rental due; these sums varying in amount as business depressions and other causes lessened the earning capacity of the respondent as a business concern.

Shortly prior to the termination of the lease, Thomas F. Conlan instituted the present action to recover the difference between the stipulated rental and the amount paid, except in so far as rental unpaid was covered by the written agreements mentioned. By a supplemental complaint, filed after the termination of the term, the amount demanded was made to include the full term, the sum for which judgment was asked being $25,600, with interest. Before the cause was tried in the lower court, Thomas F. Conlan died, and, upon a showing of the fact, his executrix, Ella P. Conlan, was substituted as plaintiff in his stead. The cause was tried by the lower court sitting without a jury, and resulted in a judgment denying a recovery. This appeal is from the judgment so entered.

The pleadings as framed by the parties reduced the actual controversy to the single question whether there had been an oral modification of the terms of the lease relative to the amount of rent reserved. On the question, the respondent had the burden of proof, and the evidence consists of that offered by the respondent, the appellant resting its side of the case on the record as it was thus made.

In this court the appellant makes two principal contentions: first, that much of the evidence introduced on behalf of the respondent was inadmissible, and that, with this eliminated, there is not sufficient evidence remaining to show a modification of the written agreement; and second, that the evidence fails to show a consideration sufficient to support the agreement to modify, conceding that such an agreement was made.

As to the first of the contentions urged, we agree with the appellant that certain of the offered testimony was improperly admitted, and cannot be considered in determining the question of the sufficiency of the evidence. The transaction with Conlan, by which the agreement to accept a lesser sum as rental than that provided for in the written lease was had by an officer and stockholder of the respondent as its representative, and he was permitted to testify to the transaction and to statements made by Conlan in the course of the transaction. We think the stockholder was disqualified under the statute (Rem. Code, § 1211; P. C. § 7722) which excludes a party in interest from giving evidence of transactions had with, or of statements made by, a deceased person, where the adverse party sues or defends as his executor, administrator or as his legal representative.

We cannot, however, agree with the contention that, excluding this evidence, enough does not remain to

support the judgment. It would serve no useful purpose to review the evidence at length. Enough is shown to make it clear that, without the reduction in the rental, the defendant would early have been forced into insolvency and would have ceased doing business as a going concern. It clearly appears also that the landlord knew of this condition, and knew that an attempt to enforce the agreement as written would result in the loss of the respondent as a tenant and the loss to him of any benefit from the contract of lease. The delinquencies, if they were such, extended over a long period of time. The payments made were by check, and these, at stated intervals, have the endorsement, "Rent in full to date." No protest against the endorsements was made, or demand for the contract rental made, until near the close of the term, and this only after a disagreement had arisen between the parties over a renewal of the lease. To our minds, the evidence points with unerring certainty to something more than mere forbearance; it points to a modification of the contract.

The objection that the agreement to reduce the rental was void for want of consideration is also without foundation. When a tenant refuses for any cause to pay rentals according to the terms of the contract of lease, the landlord has an option as to the course he will pursue. He may stand on the contract and take the remedies the law applicable to the contract affords him, or he may treat the contract as abrogated and enter into new contract with the tenant. If he does the latter, the mutual promises made by the one to the other furnish the consideration for the agreement. It may be that, in this instance, since the contract of reduction was oral and since the term extended for a longer period than one year, either party could have repudiated its further operation so long as it

was executory. But after it became an executed contract by performance, neither party could repudiate it so as to thereby acquire additional rights under it. *McInnis v. Watson,* 116 Wash. 680, 200 Pac. 578.

In the early case of *Brown v. Kern,* 21 Wash. 211, 57 Pac. 798, this court held that an agreement by a judgment creditor to accept from a judgment debtor, who was financially embarrassed, a less amount than was due upon the judgment in full satisfaction thereof, was an obligatory agreement supported by a sufficient consideration. In the course of the opinion we said:

"The theory of the law doubtless is that no benefit accrued to the creditor in accepting a portion of a debt where the debtor was legally bound to pay the whole debt, and that, therefore, there was no consideration for the contract made and entered into by the creditor and debtor for the satisfaction of the judgment or debt by the payment of a part of the same. For many years, however, courts have been dissatisfied with this rule and have refused to extend the doctrine, but have sought to restrict the operation of the rule whenever it was possible. It is certainly not in accordance with ethics, and ought not to be in accord with the rules of law, to allow a creditor to enter into a contract to compromise his debt or judgment, and by reason of that compromise receive an amount of money which he could not have received except through the medium of a compromise, and then allow him to violate his contract on the plea of want of consideration and still retain the fruits of the agreement which he made to compromise. Pleas of want of consideration are not favored by the law, especially where the relative positions of the parties have been changed by the transaction. To avoid this rule, as we have before observed, courts have decided—and sometimes the logic of the discrimination is hard to perceive—that a consideration will be presumed, if a partial payment is made by the payment of a portion of the amount agreed upon and the note of a third person taken for the balance.

Some courts have even gone so far as to hold that the acceptance of a check, or the note of the debtor for a portion of the debt, which check or note was afterwards paid, was sufficient to raise presumption of a consideration; but it is difficult to understand why a check or a note would be any more valuable than money in the amount for which the note or check was drawn. This simply goes to show the disfavor in which the rule is held, and it might be better to change the rule in a straightforward manner than to seek to destroy its operation by illogical discriminations. However, in this case it is not necessary to go so far as to overturn the established doctrine, for the reason that, under the findings of fact, which are binding upon this court, it appears that the defendant Ridpath was unable to pay this judgment. The creditor then had a judgment which was worthless in the eyes of the law, and it was certainly a consideration to him to obtain a portion of that judgment."

To the same effect are the following cases: *Williams v. Blumenthal,* 27 Wash. 24, 67 Pac. 393; *Russell & Co. v. Stevenson,* 34 Wash. 166, 75 Pac. 627; *Hidden v. German Sav. & Loan Soc.,* 48 Wash. 384, 93 Pac. 668; *Evans v. Oregon & Washington R. Co.,* 58 Wash. 429, 108 Pac. 1095, 28 L. R. A. (N. S.) 455; *Zindorf v. Tillotson,* 83 Wash. 472, 145 Pac. 587.

These cases cannot be differentiated in principle from the case before us. They lay down the rule that an obligee who agrees to accept and accepts something less from an obligor than full satisfaction of an obligation, rather than take a doubtful chance of enforcing full performance, is bound by his agreement.

The judgment is affirmed.

PARKER, C. J., MAIN, TOLMAN, and MITCHELL, JJ., concur.

[No. 16449. Department Two. October 21, 1921.]

ANGUS J. OLIVER *et al., Respondents,* v. ALEX POLSON *et al., Appellants.*[1]

MINES AND MINERALS—LEASE—ROYALTIES—ACTIONS—BURDEN OF PROOF. In a suit for minimum royalties under a coal mining lease, for a term of years unless the coal should be sooner exhausted or it should be ascertained that merchantable coal sufficient in quantity to be profitably mined did not exist, the burden of proof is upon the lessees to show that reasonable search and exploration of the lands had been made for the purpose of determining the essential conditions.

APPEAL (456)—HARMLESS ERROR—CURE BY INSTRUCTIONS—TAKING PAPERS TO JURY ROOM. The fact that the jury took to the jury room a complaint containing two causes of action, between which the plaintiffs had been compelled to elect, would not constitute prejudicial error, where the court instructed the jury to disregard the cause of action which had gone out of the case by reason of the election.

TRIAL (88)—INSTRUCTIONS—CONFUSED OR MISLEADING INSTRUCTIONS. An instruction that a mining lease is so voluminous that it is only necessary to direct the jury's attention to a few of its provisions which are directly involved was not misleading, where many of its features were not germane to the issues, and the lease was in evidence and the jury was charged to decide the issues on all the evidence in the case.

MINES AND MINERALS—LEASE—ROYALTIES—ACTION FOR BREACH—INSTRUCTIONS. In an action for royalties under a mining lease, where there was evidence that one of the plaintiffs had ordered employees of the lessee off the lands after the suit was commenced, an instruction that the refusal to permit the defendant to prospect or occupy the lands would defeat the right of plaintiffs to recover royalties after that date, was not prejudicial, the instruction being made in the interest of defendant's rights.

ELECTION OF REMEDIES (3)—ACTS CONSTITUTING—PLEADING—CAUSES OF ACTION—DAMAGES FOR BREACH OF MINING LEASE. In an action for mining royalties, a requested instruction that plaintiffs could not recover therefor subsequent to the date of commencement of the action since they had elected to treat the contract as breached

[1]Reported in 201 Pac. 289.

on that date, was properly refused where an amended complaint was filed nearly two years later claiming royalties up to the time of its filing.

APPEAL (464)—HARMLESS ERROR—INSTRUCTIONS—REFUSAL OF REQUESTS. Refusal of requested instructions is not prejudicial when they are substantially covered by those given, or are inappropriate under the rule as to the burden of proof.

JUDGMENT (54)—NOTWITHSTANDING VERDICT. A motion for judgment *non obstante veredicto*, and in the alternative for a new trial was properly refused where the evidence within the issues was such that the jury could readily have decided in favor of either plaintiffs or defendant.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 1, 1920, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Kerr, McCord & Ivey, for appellants.

Flick & Paul (*Peters & Powell,* of counsel), for respondents.

MITCHELL, J.—In February, 1910, plaintiffs, Angus J. Oliver and others, as owners, entered into a miner's lease of certain portions of sections 16, 17, 20, and 21, Township 39 N., R. 7 E., W. M., with defendant Alex Polson, for a term of years. For the purpose of this case the conditions of the lease were, substantially, a cash payment (which was made), with the right of entry for the purpose of coal mining and the making of any and all improvements on, and means of transportation on, any and all of the lands as might be necessary or convenient for searching for, working, getting, preparing, carrying away and disposing of the coal to be got from the lands. The lessee was given the right to the use of water, water-power, timber, rock, stone, and so forth, as found necessary or convenient in mining and transportation operations. Section 4 of the lease provides:

"The party of the second part shall pay to the parties of the first part, or their heirs and assigns, as royalties:

"1st: For pea coal and sizes above, sixty-five (65) cents per ton.

"2nd: For buckwheat coal, twenty-five (25) cents per ton.

"3rd: For rice coal, ten (10) cents per ton.

"4th: For all coal other than authracite mined and marketed, twenty-five (25) cents per ton.

"Long ton is contemplated in all cases.

"Such payments to be made for each ton that is mined and marketed from the said lands, during the term of this agreement, such mining and marketing to be done and royalties paid during the full term of this lease, to wit: the term of ninety-nine (99) years, unless the coal in said land shall be sooner exhausted or it shall be ascertained that merchantable coal does not exist thereon in quantities sufficient to be profitably mined."

Section 6 of the lease provides:

"The minimum amount of royalties to be paid by the second party under this agreement in any one year, after issuance of the patent, or in any event beginning not later than May 1, 1911, shall not be less than four thousand dollars ($4,000). If the royalties accruing under the provisions of this agreement for coal mined and marketed, shall aggregate in any one year less than the sum of four thousand dollars ($4,000) yet, nevertheless, second party shall pay to first parties or their assigns on account of royalties the full sum of four thousand dollars ($4,000), provided, however, that in the event the royalties accruing shall be less in any one year than the sum of four thousand dollars ($4,000), the difference between the royalties so accruing and the said sum of four thousand dollars ($4,000) shall be advanced and paid on account of royalties on coal to be mined and marketed in subsequent years, and if thereafter the royalties accruing in any one year shall exceed the sum of four thousand dollars ($4,000) there shall be deducted from

any such excess of royalties accruing, the sum or amount paid in any prior year, in excess of royalties accruing, in each year of payment; provided further, that except as hereinbefore in this paragraph limited, the parties of the first part shall be entitled to and shall receive from the second party, in addition to the sum of four thousand dollars ($4,000) per year, all royalties that may accrue in excess of that sum."

Section 10 provides:

"The party of the second part shall begin the development of the coal deposits upon said lands hereinbefore described, within nine months from the date hereof and shall thereafter prosecute the same with reasonable diligence and shall mine and market the coal from said lands as rapidly and extensively as the conditions and the market for coal shall permit."

The parties bound their heirs, representatives, assigns and successors in interest, jointly and severally, with permission to assign the lease as a whole to any party desired by the lessee, he being responsible nevertheless for the performance of the conditions and terms of the lease.

The lease was assigned by the lessee to the Washington Development Company, a corporation, of which the lessee is president and principal stockholder. Immediate possession was taken of the property, and thereafter, for a number of years, a large amount of money was spent in prospecting and attempting to develop the coal prospects on the lands and other lands adjacent thereto under the control of the lessee and his assignee within the so-called coal field. At the expiration of several years the lessee, claiming to be satisfied by his investigations and the advice of competent geologists, coal mining engineers and experts that the lands were destitute of merchantable coal in quantities sufficient to be profitably mined, abandoned the field, including the lands involved in this action, and gave

his lessors notice accordingly. The owners, having received no pay other than the cash consideration at the date of the contract, commenced this action against the defendants, Alex Polson and the Washington Development Company, on December 16, 1915, to recover twenty thousand dollars as minimum royalties for the years May 1, 1911, to May 1, 1915, and the further sum of one hundred thousand dollars for failure of the defendants to properly prospect the lands for coal and put them in producing condition, alleging the lands contained valuable deposits of coal capable of production in such quantities that royalties would far exceed $4,000 per annum during the term of the lease.

On November 5, 1917, the plaintiffs filed an amended complaint containing two causes of action separately stated. The one to recover twenty-eight thousand dollars claimed due under the contract for minimum royalties at $4,000 per annum from May 1, 1911, and the other to recover one hundred twenty thousand dollars damages for the failure of defendants to open and develop the coal mine or mines on the lands, alleged to have been available and sufficient in quantity and quality to warrant large profits in the market as conditions then existed, and to have reasonably furnished an output of four hundred tons daily, which would have made an average of twenty-five cents per ton royalty under the terms of the lease. To the amended complaint the defendants interposed a motion to require the plaintiffs to elect as between the first and second causes of action, on the ground, as claimed by the defendants, that they were inconsistent. The court required the plaintiffs to elect, and thereupon they chose their first cause of action, comprising the annual minimum royalties. In the amended answer to the amended complaint it is admitted that the defendant Washington Development Com-

pany is a corporation; that the lease between the parties, a copy of which was set out in the complaint, was entered into by the parties thereto; that it had been assigned by Alex Polson to the Washington Development Company, and that he is president and principal stockholder of the corporation. All other essential allegations of the amended complaint were denied, and affirmatively it was alleged that, at the date of the lease and at all times since, no coal in merchantable quality and sufficient quantity existed in the lands; that no consideration existed for the execution of the lease; that there has been a total failure of consideration for the lease; that royalties were to be paid only in the event coal existed in sufficient quantities to be profitably mined; and that no royalties in any sum whatever have accrued or have been owing from defendants, or either of them, to the plaintiffs. The reply denied the affirmative allegations in the amended answer.

There was a jury trial, which resulted in a verdict for the plaintiffs in the sum of twenty-eight thousand dollars. By consent of plaintiffs in open court, the defendant Washington Development Company, a corporation, was dismissed from the action. From a judgment on the verdict, with interest, defendant Alex Polson has appealed.

(1) The principal controversy in this case depends upon the construction of the lease, and consequently upon which side the burden of proof rested in the trial of the case. The jury was instructed that the burden of proof was upon the defendants to prove, by a fair preponderance of the evidence, that they made reasonable search and exploration of the lands in question for the purpose of determining the existence or non-existence of coal, and to prove, by a fair preponderance of the evidence, that merchantable coal

in sufficient quantities to be profitably mined does not exist upon such lands. Appellant claims the instruction was erroneous and that the burden was on plaintiffs, who were not entitled to recover anything until they fairly met the burden. Elaborate arguments have been made and many authorities cited by respondents' counsel upon this subject. It would be unprofitable to write with attempted clearness upon all such authorities.

In the annotation, p. 1078, L. R. A. 1917E, following the decision in the case of *Bennett v. Howard,* 175 Ky. 797, 195 S. W. 117, L. R. A. 1917E 1075, by the Kentucky court of appeals, it is said:

"It is very frequently provided in mining leases that the lessee shall pay a designated royalty on a certain tonnage of coal or ore produced, whether the same is mined or not, and very frequently the lease also contains a provision relieving the lessee of the liability for this minimum royalty under designated circumstances or conditions. In construing leases of this character, the general rules for the construction of contracts in general apply, and the provision will be construed with due regard to the lease as a whole, and in a manner to give effect to the intention of the parties as shown by the entire lease and the surrounding facts and circumstances. In general, in order for the lessee to avoid liability for the minimum royalty reserved, by invoking the provision in the lease relieving him therefrom under designated circumstances, the burden of proof rests upon him to show the existence of the circumstances or conditions designated in the lease as a ground for the suspension of the payment of the minimum royalty reserved, and also to show that the existence thereof is due to no fault on his part, and that by reason thereof, the production or mining of the minimum tonnage is not practicable. *Bennett v. Howard, ante,* 1075; *New York Coal Co. v. New Pittsburg Coal Co.* (1912), 86 Ohio St. 140, 99 N. E. 198; *Dorris v. Morrisdale Coal Co.* (1906), 215

Pa. 638, 64 Atl. 855; *Holt v. Kelley* (1909), 224 Pa. 620, 73 Atl. 947."

The lands involved are situated in Whatcom county within what is commonly called the Mt. Baker district. For some years prior to the date of this contract there had been considerable prospecting, tunneling and drilling for coal in the district by a number of persons. There were certain indications of coal on portions of the leased lands, but there were no developed or well established coal mines, or coal properties in the entire district, and at that time, or indeed at the trial of this case nine years later, no coal had ever been sold from the entire district. No doubt all the parties to this contract thought there was profitable coal in the lands, but it seems to be clear that the appellant did not rely upon any representations or assurances thereof made by the respondents, nor on the terms of the lease itself, for as to the first he testified:

"At the time I went in in 1909 until 1911 I had the utmost confidence I was going to open up the first and the finest anthracite coal vein that was opened up on the Pacific Coast. I based that opinion on my engineer's report."

Upon getting possession of this land, the appellant continued extensive explorations in the field at heavy expense, a part of which consisted of borings upon these particular lands, until reaching the conclusion that there was no coal in profitable quantities in the lands of the respondents, he notified them in April, 1912, that he would give up his lease on the property, after which it appears he did nothing more on these lands; and thereafter, about February, 1916, he abandoned the whole field, with reference to which he testified:

"I had absolutely no intention at any other time of ever returning there for the purpose of developing this

property. I was through with the field for ever, as far as I was concerned."

In the meantime, and prior to notifying the respondents of his intention to give up the lease, there is evidence to show there were negotiations at the instance of the appellant looking to an extension of time in which to pay the annual minimum royalties as provided for in the lease. Now, turning to the text or the terms of the lease, it is said by counsel for appellant in written argument:

"The lease itself recognized that it had not been ascertained or become known whether merchantable coal existed upon the leased lands."

The written lease does not assure the existence of coal in merchantable quantities, nor provide for compensation only upon condition that it is there in that kind and quantity, but, on the contrary, it was covenanted:

"Such mining and marketing to be done and royalties paid during the full term of this lease, to wit: The term of ninety-nine (99) years, unless the coal in said land shall be sooner exhausted or it shall be ascertained that merchantable coal does not exist thereon in quantities sufficient to be profitably mined."

The words in the alternative, viz: "or it shall be ascertained that merchantable coal does not exist thereon in quantities sufficient to be profitably mined" would be idle if appellants' present contention be allowed to prevail. The ignoring of those words would constitute a transgression of the rule requiring all the language of a written instrument to be taken into account in construing it.

The appellant undertook to pay annually a minimum amount of four thousand dollars, unless he could show that merchantable coal in paying quantities did not exist, and, for his protection, if he ascertained it did

so exist but it became exhausted within the term of ninety-nine years, he should then be released from liability.

The case of *Adams v. Washington Brick etc. Coal Co.*, 38 Wash. 243, 80 Pac. 446, cited by appellant, we think is not helpful here. In that case there was no question about the tract of land containing a quantity of clay suitable for the manufacture of brick. But the clay having become exhausted before the expiration of the term, the suit brought thereafter presented the question if the whole property or simply the clay substance was the real subject-matter of the lease, and it was decided that the latter was the controlling consideration and that, upon its becoming exhausted, a termination of the contract was effected. Nor do the cases of *Diamond Iron-Mining Co. v. Buckeye Iron-Mining Co.*, 70 Minn. 500, 73 N. W. 507, or *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570, cited in the *Adams v. Washington Brick etc. Coal Co.* case, and relied upon by appellants here, hold to the contrary, but as we understand, each of them holds, under its own particular facts and circumstances, that the non-existence of ore was a defense to an action to recover royalty. The situation is similar in principle to the case of *Wilson v. Beech Creek Cannel Coal Co.*, 161 Pa. St. 499, 29 Atl. 100, wherein it was said:

"If a test of the property was necessary, it was the duty of the lessee to make it. This is apparent from the following clause of the lease: 'It is further agreed that should said seam of coal prove faulty in the strata, or unmerchantable in its quality, so rendering it impracticable to mine or dispose of the same in reasonable quantity, the said lessees shall have the right to abandon the same, with the right to remove all the improvements by said lessee erected on or under said premises, but all advances of royalty paid for coal not mined shall be forfeited to said lessor.' It may be

that a condition such as is described in this clause would constitute a defense to an action for the rent, but the burden of showing that it exists lies on the defendant company. It has the right to mine and dispose of the coal in the Soult seam. In the exercise of this right, it may develop a condition which will relieve it from further liability under the lease; but the lessor, having parted with his right to mine the leased coal, is not in a position to acquire by his own efforts, further information respecting the quality and quantity of it."

In the present case the court correctly interpreted the lease in this respect and placed the burden of proof on the appellant. This conclusion disposes of a large number of assignments of error relating to instructions given and others requested by the appellant which were refused by the trial court.

(2) The jury was permitted to take the amended complaint to its room in deliberating on its verdict. It contained the statement of the second cause of action for damages in the sum of $120,000. It is urged by the appellant that the possession by the jury of that portion of the amended complaint was prejudicial to him. The court, however, took care of the matter by instructing the jury to "disregard the second cause of action entirely, as *under the order of the court* the plaintiffs have elected to proceed only upon the first cause of action."

(3) Exception was taken to an instruction that the lease is voluminous but it is only necessary to direct the jury's attention to a few of its provisions which are directly involved, and it is claimed the court should have instructed the jury to consider all the provisions in the lease. The lease was admitted in evidence, besides being plead and admitted, and in one of its instructions the court did tell the jury they must consider and decide the issues on all the evidence in the

case. There was nothing misleading in the instruction given, but, on the contrary, it was perfectly proper for the sake of clearness to call the jury's attention, as the court did do, to those particulars of the lease that were directly involved, and certainly there were many of its features which were in no special way germane to the controversy or issues submitted by the pleadings and the evidence.

(4) There was evidence that, about September, 1916, one of the respondents ordered the employees of the appellant off the premises. The jury was instructed that, if satisfied by the evidence that the plaintiffs, or either of them, refused to permit the defendants or their agents to prospect and occupy the lands, the plaintiffs could not recover any minimum royalties accruing after that date. It is argued the instruction is unsound because it advises the jury that, if the plaintiffs breached the contract, they could nevertheless recover under the contract up to the time that they breached it, thus permitting them to take advantage of their own wrong. The argument singles out but one instruction which, when considered in connection with the rest of them, appears to have been intended to care for the rights of the appellant himself. Other instructions amply advised the jury upon the subject generally. The appellant had abandoned his lease long prior to the incident in question, and the whole theory of the defense in the submission of its evidence was that there was no merchantable coal in profitable quantities in the land. The incident referred to happened after the suit was commenced, and the appellants' agents were there, it appears, to gather evidence for the purpose of the trial.

(5) It is objected that the court refused to give a requested instruction that, by the commencement of the

action on December 16, 1915, the plaintiffs elected to treat the contract as breached on that date, and that in no event could the plaintiffs recover any minimum royalties for any period subsequent to that date. The argument is not convincing. In the first place, it was not affirmatively plead by the answer nor raised at any time before the verdict. The two causes of action were pleaded as one in the original complaint, in different amounts as to each from what they appeared in the amended complaint because of the added length of time the lease had to run. In both complaints the two causes of action were the same in substance though not in amounts. The one cause was for the minimum royalties, and the other was for the amount of royalties recoverable according to the schedule provided in the lease, had the appellant properly prosecuted the ascertainment, development and production of coal as it was claimed he was obligated to do, not for the whole term of the lease, but only those years for which it was sought to recover the minimum annual royalties then due. The legal effect was but a duplication of the causes of action or the inclusion of the one in the other. There was no claim of damages for the breach of the contract for the whole term of ninety-nine years, but both causes of action related only to damages for failure to comply with the obligations of the lease, upon the plans of payment therein provided, for the time or period from the date of the lease to the dates of the complaint and the amendment, respectively.

(6) Other claims of error predicated upon the court's refusal to give instructions requested by the appellant cannot be sustained, for either they were substantially covered by instructions that were given, or they were not appropriate because of appellant's mistaken view of the burden of proof.

(7) Finally, it is contended the motion for judgment

n. o. v. and, in the alternative, for a new trial should have been granted. While all the grounds for a new trial provided for in the statute were set out in the motion, the only one urged upon our attention on the appeal is the insufficiency of the evidence to justify the verdict. There is a large amount of evidence in the record both for and against the contention that merchantable coal in profitable quantities exists in the leased lands. Each side produced an array of distinguished and experienced scientists and coal mining experts, engineers and workers, who testified favorably to that side on the basis of both theory and actual and oftentimes repeated extensive examinations and investigations of the leased lands and the whole coal field. Many of the witnesses were familiar with market values of the different grades of coal, the costs of mining, and of the transportation rates prevailing during the period of time involved in the controversy. At the conclusion a situation was presented wherein the jury could easily, within the testimony, have decided the issues of fact in favor of either the respondents or the appellant without the risk of any possible proper interference at the hands of the court. Under such circumstances, the trial court did not commit error in denying the motion.

Concluding that the trial was fair, the judgment is affirmed.

PARKER, C. J., MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

[No. 16734. Department Two. October 24, 1921.]

THE STATE OF WASHINGTON, *on the Relation of William Hanson et al., Plaintiff*, v. THE SUPERIOR COURT FOR YAKIMA COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN (39)—NECESSITY FOR APPROPRIATION—EVIDENCE—SUFFICIENCY. Necessity for the appropriation of land for a public highway is established in condemnation proceedings by evidence showing the purpose is to avoid two bad curves, thereby decreasing the length of the highway, preventing bad curvature, and avoiding considerable congestion.

Certiorari to review a judgment of the superior court for Yakima county, Nichoson, J., entered September 6, 1921, adjudging a public use and necessity in condemnation proceedings, after a hearing before the court. Affirmed.

McAulay & Meigs, for relators.

The Attorney General and *John A. Homer, Assistant*, for respondents.

PER CURIAM.—Certiorari to review the order of necessity in a condemnation by the state of a short strip of land for the construction of a part of the Inland Empire Highway.

Chapter 32, p. 116, § 1, Laws of 1921, amending § 5872 Rem. Code, provides:

"In case of condemnation to secure such lands, the action shall be brought in the name of the state . . . and in such action the selection of the lands by the supervisor of highways shall, *in the absence of bad faith, arbitrary, capricious or fraudulent action, be conclusive upon the court and judge before which the action is brought that said lands are necessary for the purpose sought.*" (Italics ours.)

[1]Reported in 201 Pac. 1.

The evidence in this case shows that the condemnation is sought for the purpose of avoiding two bad curves that at present exist in the public roads and streets, and that the road, as condemned, will decrease the length of the highway, prevent bad curvature, and avoid considerable congestion. These facts, far from establishing the bad faith, arbitrariness, capriciousness and fraudulent action required by the statute to be shown in order to nullify the selection, vindicate the selection of such land, and confirm the finding of necessity made by the lower court. *State v. Superior Court,* 111 Wash. 542, 191 Pac. 413; *State ex rel. Urquhart v. Superior Court,* 112 Wash. 34, 191 Pac. 416.

Order affirmed.

[No. 16419. Department Two. October 25, 1921.]

WILLIAM T. MURRAY *et al., Respondents,* v. THE CITY OF SPOKANE, *Appellant.*[1]

MUNICIPAL CORPORATIONS (426, 465)—SIDEWALKS—SNOW AND ICE—NEGLIGENCE—QUESTION FOR JURY. Where for a month or more ice had remained upon a city sidewalk at a place where a woman slipped and was injured by a fall, the ice being uneven and rounded upon the sidewalk which sloped in two directions, the city was liable in damages, though the water from which the ice was partly formed came from adjoining premises; nor would the fact that there had been alternate thawing and freezing relieve the city.

NEW TRIAL (40)—GROUNDS—NEWLY DISCOVERED EVIDENCE. The denial of a motion for new trial is not an abuse of the court's discretion, where affidavits alleging newly discovered evidence are contradicted by counter-affidavits.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 31, 1920, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

J. M. Geraghty and *Alex M. Winston,* for appellant.

Robertson, Miller & Robertson, for respondents.

MITCHELL, J.—Respondents brought this action against the city of Spokane to recover damages for injuries caused Mrs. Murray by falling upon a sidewalk, and, obtaining a verdict and judgment therefor, the city has appealed.

Only two contentions are now made by the appellant: (1) That the evidence is insufficient to show liability on the part of the city, and (2) that the court abused its discretion in denying a motion for a new trial.

There is evidence to show that the accident occurred on January 29, 1917, on a four-foot cement sidewalk in

[1]Reported in 201 Pac. 745.

front of residence property. The sidewalk where the accident occurred was slanting both ways, along the street and from the property line to the street. The surface of the residence lot was some four or four and one-half feet above and drained towards the sidewalk. A walkway from the residence led down to solid cement steps through a retaining wall and thence down to the surface of the sidewalk. The drainage and seepage from the lot were down the steps onto the sidewalk, where much of it froze in the then prevailing cold weather. The weather reports show that, on the day of the accident, the maximum temperature was thirty and the minimum twenty-one; on the day before, the maximum was thirty-four, the minimum was twenty-eight; and two days before, the maximum was forty, the minimum thirty. That is all that was shown by the weather reports concerning the temperature. The residence lot is on the south side of the sidewalk and shelters it from the sun. A number of witnesses testified that ice had been accumulating on the sidewalk, variously estimated at from two to four inches thick next to and near the steps, down to very thin ice six or seven feet down the sidewalk, and also on the outer edge of the sidewalk. One of the witnesses describing it said:

"The sidewalk was covered with thin sheet of ice, and opposite the point where the stairway came down had been—the water was overflowing, it was raised. Where the water had been freezing continually it was raised so it was slightly curved. It was not a flat walk. The hill sloped to the street slope, making a slight slope to the sidewalk. This ice had accumulated in the form of a swelling, to describe it in that way, just a little raise."

There was ample evidence that ice in the same place in substantially the same form had remained there for considerable time, some of the witnesses said for as

much as thirty days, and others fixed a longer period. They testified the place was not free from such ice formation during any portion of that time. At the place nothing had been done for the purpose of safety, although other portions of the sidewalk whereon the ice was evenly distributed had been treated from time to time by scattering ashes or other material thereon. Mrs. Murray was not aware of the condition of the ice at that place, and just a few minutes before she fell, there was a light snow fall, less than one-half inch, that covered the ice. She seemed to have been in no way careless. She wore walking shoes with large heels and also wore storm rubbers.

The conditions described by the evidence, the jury was at liberty to accept, were more than mere slipperiness caused by ice on the sidewalk. There is evidence that the ice at the particular place was uneven and rounded upon the sidewalk that inclined both ways, so as to make it an obstruction and cause it to be unsafe for travel with the exercise of reasonable care. The conditions were such as to fall within the rule laid down in *Calder v. Walla Walla,* 6 Wash. 377, 33 Pac. 1054, which has been reaffirmed in subsequent cases. *Smith v. Spokane,* 16 Wash. 403, 47 Pac. 888; *Piper v. Spokane,* 22 Wash. 147, 60 Pac. 138; and *Wren v. Seattle,* 100 Wash. 67, 170 Pac. 342. Nor does the fact that the water which partly formed the ice came from the adjoining premises and that there may have been alternate thawing and freezing relieve the city in this case, since the testimony shows that for a month or more the ice never entirely melted. *Smith v. Spokane, supra.*

Authorities cited by the appellant have been examined and, in our opinion, are not controlling here. They refer to recurring or recently formed obstacles which were the immediate cause of trouble. The one

case apparently most relied upon, because similar to the case at bar in many of its physical aspects, is *Kortland v. City of Mt. Vernon,* 129 App. Div. 535, 114 N. Y. Supp. 252, the opinion being quoted in full in appellant's brief. In it the court first lays down the general rule as follows:

"The ascertainment of the principles of law which must control the disposition of cases of this character is not difficult. An affirmative duty rests upon a municipality to keep its sidewalks reasonably free from accumulations of ice and snow, and the failure to act, after actual notice, or after time sufficient to justify the inference of knowledge, presents a question of negligence for the jury's consideration. *Keane v. Village of Waterford,* 130 N. Y. 188, 29 N. E. 130; *Beck v. City of Buffalo,* 50 App. Div. 621, 63 N. Y. Supp. 499. If the city allows drains or leaky plumbing to discharge water across the sidewalks, which, freezing, forms ice in cold weather, it is evidence of negligence (*Pymm v. City of N. Y.,* 111 App. Div. 330, 97 N. Y. Supp. 1108); but no duty rests upon property owners or upon the municipality itself to remove snow or ice until it has ceased falling."

And, while the decision was in favor of the city, it was because of the particular facts concerning which, among other things, the opinion says:

"For aught that appears, it may have been that the ice which caused the plaintiff to fall was formed the very day or the day before the accident. Under such circumstances, sufficient time had not elapsed to charge the defendant with negligence."

And again, as to the facts, it reads:

"It seems clear to me therefore that, had this accident happened by the plaintiff slipping upon the old accumulation of snow and ice which had remained there all winter, the defendant would have been liable; but, if she slipped upon the ice formed by the recent freezing of the water discharged from the vacant lot, the defendant would not be liable."

No rule is more firmly established than that a city is not an insurer for the safety of its streets and walkways. But under the facts in this case, the question of the city's negligence and liability was for the jury's consideration, under proper instructions, of which latter no question is raised.

The motion for a new trial presents the question of newly discovered evidence. The situation, in substance, is that, upon the respondents' presenting their claim to the city, its proper officers, upon investigating, inquired of the owner of the residence property as to the condition of the sidewalk at and prior to the date of the accident, and were by him informed that he could not tell, as he had been absent during all of that month of January. At the trial, and before the verdict was returned, the property owner, who under an ordinance of the city is charged with the primary duty of removing snow and ice from the sidewalk, and who claimed to have thought the accident occurred about the last of February instead of the last of January, then told the city's attorney trying the case that he had mistaken, that he was absent during February but at home during January, and that the sidewalk had been kept clear during all of the month of January. In the latter respect there was a corroborating affidavit by his son; and also supporting affidavits by the officers of the city as to the misinformation by the property owner and his correction of it. This was not called to the attention of the trial court until after the verdict. There was a counter affidavit by the respondent Mrs. Murray, undenied categorically, that, during the month of January and prior to the 29th, she noticed that the shades in the house at 201 West 6th street in Spokane (in front of which the accident happened) "appeared to be drawn, down, indicating that the house was vacant and no one living there;" that, on or about February 5 or 6, while

she was in bed suffering from her injuries, the owner of the residence spoken of called to see her, handed her his card (which was attached to her affidavit) stating that he owned the residence property; that he was solicitous about her condition and recovery; that his family was in California for the month and he was staying down town; and that he would like to do anything he could for her. Also there were counter affidavits of persons, other than those who had testified at the trial, that the sidewalk had not been clear of ice and snow during the winter and prior to the accident, and that no sand or ashes had been sprinkled on the sidewalk to lessen its dangerous condition.

Under such circumstances, we are of the opinion the trial court did not abuse its discretion in denying the motion for a new trial.

Affirmed.

PARKER, C. J., TOLMAN, and HOLCOMB, JJ., concur.

[No. 16705. Department Two. October 31, 1921.]

THE STATE OF WASHINGTON, *on the Relation of the City of Yakima, Appellant,* v. E. V. KUYKENDALL *et al., Respondents.*[1]

WATERS AND WATER COURSES (78)—WATER COMPANIES—FRANCHISE—LOCATION AND SECURITY OF MAINS—POWERS OF PUBLIC SERVICE COMMISSION—EVIDENCE—SUFFICIENCY. Assuming that the state department of public works has jurisdiction to interfere with water mains laid in city streets in accordance with a franchise, no occasion therefor is shown by evidence that a city desiring to lay a hard surface pavement in one of its streets, demanded that the water company replace its wooden by iron mains or shift the mains to a parking strip, it appearing that the principal leakages had been from a main whose use had been discontinued, or from service pipes whose system of connections had been so altered as to diminish leakage to a negligible quantity, and that in the event of leakage the company

[1]Reported in 201 Pac. 777.

could take care of it without serious interference with the hard surface pavement.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered June 18, 1921, affirming an order of the public service commission, after a hearing upon certiorari. Affirmed.

Thomas E. Grady and *Vance & Christensen*, for appellant.

The Attorney General, Raymond W. Clifford, Assistant, John A. Laing, and *Henry S. Gray*, for respondents.

MACKINTOSH, J.—The Pacific Power & Light Company, a public service corporation operating a water plant in Yakima, some thirteen or fourteen years ago laid a twelve-inch wooden pipe on 16th avenue in that city. In 1920, the city became desirous of paving 16th avenue, and requested the power company to remove the wooden main and either substitute therefor an iron main or, in the alternative, place the wooden one in the parking strip adjoining the roadway proper, for the reason that, as the city claimed, the wooden main frequently leaked, and in order to make repairs it will be necessary to tear up the pavement, with resulting injury thereto. The power company refused to comply with the city's demand, and application was made to the public service commission (now the department of public works) for the purpose of compelling the power company to accept one of the two alternative changes. On the hearing before the department, the application was dismissed, and thereafter a writ of review was sued out to the superior court, where the action of the department was affirmed, and from this judgment of the superior court, an appeal has been brought here.

Section 70, ch. 117, p. 584, Laws of 1911; Rem. Code, § 8626-70 (P. C. § 5597), under which the proceeding has been brought, is as follows:

"Whenever the commission shall find, after hearing had upon its own motion or upon complaint, that repairs or improvements to, or changes in, any gas plant, electrical plant or water system ought to be made, or that any additions or extensions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for manufacturing, distributing or supplying gas, electricity or water, the commission may enter an order directing that such reasonable repairs, improvements, changes, additions, or extensions of such gas plant, electrical plant or water system be made."

The department of public works found that the wooden pipe was reasonably sufficient for the purpose of carrying water, and furnished adequate service and facility, and further found that it had no authority to order a change in a pipe which had been laid under a franchise, even though it might be possibly, on account of its leaking, a detriment to the pavement, by weakening the foundations so that the pavement itself might be damaged, or occasion injury to persons using it.

On the one hand, it is claimed that the section which we have quoted gives the department of public works no jurisdiction in cases of this kind, for the reason that the section is concerned primarily with the public service furnished by the company, and with the contract or relations between the company and the public in respect to the service. In other words, that the department of public works is not granted the power to modify a franchise relating to the manner of occupying public streets or to require changes in equipment, except such changes as are reasonably necessary to furnish adequate service, or to provide safety for the

public or employees in the furnishing of such service.

On the other hand, it is claimed that the language of the act, "in order to promote the security or convenience of the public or employees," gives the department jurisdiction to determine controversies between a municipality and a public service corporation in regard to the character of the equipment it must maintain on public streets in order to promote the security and convenience of the public.

As we view the record in this case, it is not necessary to determine whether the department of public works has jurisdiction or not to pass upon the question whether the public functions of the utility are here involved, or whether it is necessary, in order for the department to have jurisdiction, that the matter be one of more than the violation of some private or contractual right, even though it may be one of public interest.

From a reading of the testimony introduced before the department, and the department's findings thereon, it satisfactorily appears that the condition of the wooden pipe complained of in no event necessitated its removal in order to promote the security or convenience of the public, giving that phrase the full meaning contended for by the city. The testimony is clear that the leaks which have heretofore taken place in the avenue were, for the most part, those which were occasioned by another main the use of which is now discontinued, or those in service pipes which were occasioned by the manner of their connection with the twelve-inch main; and that these connections now have been lowered and attached in a different manner and protected by insulation, and that, since the installation of the new system of connections, the number of leakages has diminished to a negligible quantity.

The evidence is that, under the old manner of connections, leakages would have just as frequently occurred had the main been of metal. It furthermore appears that the main is so located that in the event leaks should occur they could be taken care of without any serious interference with the hard surface pavement which it is proposed to construct. With the record in this condition, even assuming the department of public works has jurisdiction to interfere with construction in city streets made in accordance with the franchise, still the facts do not justify the action asked by the city, and the conclusions of the department and of the superior court are affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16725. Department Two. October 31, 1921.]

GEORGE DELOS MEEKER, *Appellant*, v. ELLA ELIZABETH MEEKER, *Respondent*.[1]

DIVORCE (49)—DECREE—ACTION TO VACATE—FRAUD—PROCEEDINGS. A petition to set aside a judgment on the ground it was procured by fraud is properly filed in the original cause, under the provisions of Rem. Code, §§ 466-469.

DIVORCE (47, 47-1)—VACATION—JURISDICTION—FRAUD—PETITION—PROOF OF ALLEGATIONS—WAIVER. On a petition by a wife to set aside a divorce decree in favor of the husband on the ground it was procured by fraud, to which the husband demurred on the ground it did not state facts sufficient, such demurrer constituted a waiver of the constructive denial afforded by Rem. Code, § 468, and an admission on his part of the truth of the allegations of the petition, warranting the action of the court in setting aside the decree on his refusal to plead further.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered April 1, 1921,

[1]Reported in 201 Pac. 786.

vacating a divorce decree, upon overruling a demurrer to the petition, after a hearing to the court. Affirmed.

Troy & Sturdevant, for appellant.

Vance & Christensen, for respondent.

HOLCOMB, J.—This is a case where the wife in a divorce action brought by the husband has petitioned the trial court for a vacation of the decree of divorce granted the husband, and for permission to appear in, answer and defend the action.

The petition was filed in the original action and recites that the husband, at the time of filing his complaint, also filed an affidavit for the publication of summons, wherein he stated under oath that his wife was not a resident of the state of Washington and that her whereabouts and her post office address were not known, and had not been for some time. Summons was thereupon published, and subsequently the divorce was granted the husband upon the default of his wife.

The petition further recites that the wife had no notice whatsoever of the pendency of the action, and that for many years last past, except for such time as they have lived together in the state of Washington, her address has been Oswayo, Potter county, Pennsylvania, at which place she has received her mail. She further alleged that, when she returned to Pennsylvania from the state of Washington, her husband shipped her personal belongings to this same address, and before the divorce action was instituted sent deeds to her for her signature at this address, and during the time the divorce action was pending the husband wrote her letters, and also had communication by mail with one of their sons at the same address. It is alleged that, immediately after the wife learned of the divorce decree, this proceeding was commenced, stating that

she had a good and valid defense to the complaint, and asking that the decree be vacated and she be permitted to answer and defend therein.

This petition was accompanied by a notice which was filed, directed to the plaintiff in the original action and to Troy & Sturdevant, his attorneys, in which they were notified that the defendant had filed a petition praying that the decree of divorce granted in the action be vacated and set aside, and plaintiff was required to answer the petition within twenty days after the service of the notice upon him, exclusive of the day of service; otherwise, upon failure so to do, judgment would be rendered vacating and setting aside the decree according to the demand of the petition, which had been filed with the clerk of the court. The notice and petition were filed in the lower court on January 22, 1921.

To the petition plaintiff, appearing by his attorneys, interposed a general demurrer upon the grounds, first, that the court was without jurisdiction; and second, that it did not state facts sufficient to entitle the respondent to the relief demanded in her petition.

The superior court overruled the demurrer, whereupon plaintiff refused to proceed further, and the court decreed the vacation of the judgment and gave leave to the defendant therein to answer and defend the alleged action, without taking any evidence.

The errors urged are: (1) in overruling plaintiff's demurrer, and (2) in decreeing vacation of the judgment alleged in respondent's petition, and allowing the defendant to answer and defend the action alleged in her petition without taking any evidence in proof of the allegations of her petition.

Appellant argues that respondent's procedure by petition in the original case is wrong, and that there is no proper procedure to set aside the judgment in

the original cause except by an original, independent action, citing Rem. & Bal. Code, §§ 466 to 469 (P. C. §§ 8132, 8133, 8134, 8137), inclusive; *Roberts v. Shelton & Southwestern R. Co.*, 21 Wash. 427, 58 Pac. 576; *Cooper v. Cooper*, 83 Wash. 85, 145 Pac. 66; *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F 721; *Anderson v. Anderson*, 97 Wash. 202, 166 Pac. 60.

The code, § 467, plainly provides that the proceedings to obtain the benefit of subd. 4, § 464, which is that a judgment may be vacated or modified after the time of which it was rendered, "for fraud practiced by the successful party in obtaining the judgment or order," shall be by petition, verified by affidavit, setting forth the judgment or order and the facts or errors constituting the cause to vacate or modify, and if the party is a defendant, the facts constituting a defense to the action.

Section 468 of the code provides that:

"In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up in the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, etc."

It will be observed that the respondent followed the above procedure.

It is true that, in *Anderson v. Anderson, supra,* we used language quoted by appellant which seems to condemn that procedure, as follows:

"The filing of a petition in the original suit is contrary to the practice as defined by our former decisions. An attack upon a judgment for fraud in its procuring, by petition is the inception of a separate, independent action."

We observe that that opinion was concurred in by only two of the judges. It is also observed that in that case the trial judge took cognizance of the proceeding by petition, but was reversed on the ground that the petition did not set forth facts sufficient, and because the trial court found there was no fraud. We are impelled to the opinion that this dicta, for that it evidently was in this case, is in no wise controlling, and furthermore, that our former and subsequent decisions have approved this procedure. In the cases of *Roberts v. Shelton & Southwestern R. Co.,* and *Cooper v. Cooper, supra,* we approved the procedure, but held that for every practical purpose such a proceeding, involving issues and requiring evidence which may be wholly independent of the issues and evidence in the original action, and "in which the parties, regardless of their designation in the original action, occupy the relation of plaintiff and defendant according to the issues presented by the petition, and in which those issues may take all the range of an independent bill in equity for relief against the judgment is, in its very nature, a new proceeding . . . ." *Cooper v. Cooper, supra.*

See, also, *Pringle v. Pringle,* 55 Wash. 93, 104 Pac. 135; *Chaney v. Chaney,* 56 Wash. 145, 105 Pac. 229; *Jarrard v. Jarrard,* 116 Wash. 70, 198 Pac. 741.

As to the second ground for reversal, of course the petition stands denied without answering, under the statute, but instead of standing on his constructive answer, the husband appeared and demurred generally, and stood upon that, thus admitting the allegations of the petition and waiving the denial the statute gives.

The judgment must be and is affirmed.

PARKER, C. J., HOVEY, MAIN, and MACKINTOSH, JJ., concur.

[No. 16649. Department Two. November 1, 1921.]

THE STATE OF WASHINGTON, *on the Relation of C. W. Gillespie, Appellant,* v. E. V. KUYKENDALL, *as Director of Public Works, Respondent.*[1]

PROHIBITION (15, 20, 37)—TO OFFICERS—WANT OR EXCESS OF JURISDICTION—RETURN OR ANSWER—EFFECT OF DEMURRER. Prohibition lies against the director of public works where he is threatening, without or in excess of his jurisdiction, to accept insurance policies issued by an automobile insurance exchange which has no articles of incorporation and is not licensed to do business in the state, in violation of Laws 1921, p. 341, § 5, which requires for hire owners or operators to furnish security by an insurance company licensed to write liability insurance in the state of Washington, or a surety bond of a company licensed to write surety bonds in the state.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered July 9, 1921, upon sustaining a demurrer to the application, dismissing an action for a writ of prohibition. Reversed.

Troy & Sturdevant, for appellant.

The Attorney General, Raymond W. Clifford, Assistant, and *VanDyke & Thomas,* for respondent.

HOLCOMB, J.—This is an appeal from a judgment of the lower court sustaining a demurrer to the application and affidavit of relator for a writ of prohibition and to restrain the director of public works from accepting liability policies and surety bonds from one Charles Sumner Best, and a concern called "The Automobile Insurance Exchange."

It is averred in relator's affidavit, among other things, that respondent, as the duly appointed, qualified and acting director of public works, is vested with the sole jurisdiction to enforce the provisions of chapter 111, p. 338, Laws of 1921, relating to the regulation

[1]Reported in 201 Pac. 778.

of motor propelled vehicles in the transportation of persons and property for compensation over any highway; and that § 5 of that law provides that the owner or operator of a motor propelled vehicle coming within the terms of such law must furnish security for the payment of recoveries up to certain amounts, on account of personal injuries or property damages, by filing with the director "liability and property damage insurance from an insurance company licensed to make liability insurance in the state of Washington, or a surety bond of a company licensed to write surety bonds in the state of Washington," on each motor-propelled vehicle.

After referring to certain provisions of the insurance code of the state of Washington, it is further averred that the director has ruled and announced that, as full compliance with § 5, ch. 111, p. 341, *supra*, he will permit and allow any owner or operator to file with him an original automobile policy issued to the owner or operator under and by reason of classification 13½ of § 6059-83, Rem. Code (P. C. § 2990), being motor vehicle insurance, providing there is endorsed on such policy certain provisions regarding the liability thereof, and not compel the giving of liability insurance as provided in § 5, ch. 111, *supra*, by a company licensed to write liability insurance in the state of Washington. The affidavit further avers that this relator is a subscriber to a certain instrument, a copy of which is attached to his affidavit and made a part thereof, by the terms of which Charles Sumner Best & Company was appointed attorney-in-fact with certain powers given under certain restrictions; that Best assumed the name of "The Automobile Insurance Exchange" as the name to be used upon policies of insurance to be issued; that the Automobile Insurance

Exchange is not a company licensed to do business in the state of Washington, and has no articles of incorporation or charter; that the Automobile Insurance Exchange and Best, as the attorney-in-fact of this subscriber and relator, has issued a number of automobile policies under subd. 13½ of § 6059-83, and the director has agreed to and will accept such automobile policies so issued out of the exchange, as full compliance with § 5, ch. 111, *supra;* that the exchange has no right or license to write liability insurance, nor has it any right or license to write the surety business under § 5, being subd. 5 of § 6059-83, as required by § 5, ch. 111, *supra;* that the threatened action of the director in taking such character of policies from Best or the Automobile Insurance Exchange, not being issued by a company licensed to write liability insurance or surety bonds in the state of Washington, is without and in excess of jurisdiction in the director, by the provisions of ch. 111 *supra;* that the threatened action on behalf of the director will be oppressive to the relator, and that plain, speedy and adequate remedy can only be had by writ of prohibition.

In the instrument subscribed by relator and attached to his affidavit as exhibit "A," denominated "Authority from the Subscribers," the only authority granted to issue insurance is as follows:

"To accept applications for and to make and issue policies of insurance on subscribers' property against loss or damage from any casualty, according to the printed and written conditions of the policy form of the Automobile Insurance Exchange, and motor vehicle bonds as required by Chapter 57, Session Laws of 1915, on form prescribed by statute, subject to the control of the subscriber as hereby provided for, and to make us severally liable for an amount not exceeding the amount herein set forth; provided no policy

of insurance shall be issued except to a subscriber of the Exchange or to a company or association by way of re-insurance as provided in the by-laws."

An alternative writ of prohibition was issued made returnable June 27, 1921, and respondent appeared by the *Attorney General* on the return day and demurred to the application and showing on behalf of the relator. No answer or return to the alternative writ of prohibition was made other than by demurrer. The respondent stood upon his demurrer. On July 9, 1921, the court entered an order sustaining the demurrer and dismissing the action.

The only assignment of error on the part of appellant is that the court erred in sustaining the demurrer and dismissing the action.

In the briefs it is argued by respondent as if the case were here on a full return of facts, which is not the case. By standing upon the demurrer respondent admitted all of the allegations of fact in the complaint or affidavit, and that, among other things, avers that the Automobile Insurance Exchange and Charles Sumner Best have no license to write the kind of insurance and surety bonds that the director of public works has announced he will accept. It is also averred that the Automobile Insurance Exchange is not a company licensed to do business in the state of Washington, and has no articles of incorporation or charter.

Section 5, ch. 111, p. 341, Laws of 1921, directs and empowers the director of public works, in granting certificates to operate to any auto transportation company for transporting persons or property for compensation, to require the owner or operator to first procure liability and property damage insurance from a company licensed to make liability insurance in the state of Washington, or the surety bond of a company licensed to write surety bonds in the state of Wash-

ington, on each motor-propelled vehicle used or to be used in transporting persons and property for compensation, in an amount not to exceed $5,000 for any recovery for personal injuries by one person, and not less than $10,000, and such additional amount as he shall determine, for the persons receiving personal injury by reason of one act of negligence, and not to exceed $1,000 for damage to property of any person other than the insured; and to maintain such liability and property damage insurance or surety bond in force, etc.

There being no return or answer to the alternative writ of prohibition showing otherwise than as alleged in relator's affidavit and application, and the facts alleged being admitted by the demurrer, it is manifest that, if such facts are true, the director is acting and threatening to act without or in excess of his jurisdiction. In such case prohibition always lies.

Under the state of the record, we have no option but to reverse the judgment and remand it with instructions to overrule the demurrer and require respondent to make return and answer to the alternative writ of prohibition, and for further proceedings thereunder.

Reversed and remanded.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16652. Department Two. November 1, 1921.]

J. A. STEVENS, *Respondent*, v. LYDIA SWEITZER *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER (15, 18)—FRAUD—MISREPRESENTATIONS. Where a party upon a sale or exchange of property undertakes to show his land to a prospective purchaser, he is bound to show the land he owns and its boundaries, if required, under penalty of responding in damages or to an action in rescission; and the vendor cannot evade responsibility on the score of being ignorant of the exact location of his own land.

HUSBAND AND WIFE (42)—ACTIONS—PARTIES. An action by the husband for rescission of an exchange of property is not demurrable for defect of parties plaintiff because the wife was not joined, where the complaint alleged ownership of the property by the husband in his own right, such allegation being sufficient in the absence of a motion to make more definite and certain.

Appeal from a judgment of the superior court for Grays Harbor county, Abel, J., entered February 26, 1921, in favor of the plaintiff, in an action for rescission, tried to the court. Affirmed.

J. A. Hutcheson, for appellants.

E. S. Avey, for respondent.

HOLCOMB, J.—Under the issues of fact pleaded in this case, the facts shown upon the trial amply justify the decree of rescission. There was an exchange of properties, and representations by appellants that their lands were well timbered, and they undertook to point out their lands and the timber to respondent, but pointed out a different tract, an adjoining forty to the one owned by appellants, the one pointed out being well timbered, while the one owned by appellants had but little or no valuable timber upon it.

[1]Reported in 201 Pac. 764.

Where a party undertakes to show his land to a prospective purchaser he is bound to show the land he owns and the boundaries thereof, if required, under penalty of responding in damages or to an action in rescission. *Freeman v. Gloyd,* 43 Wash. 607, 86 Pac. 1051; *Shaw v. O'Neill,* 45 Wash. 98, 88 Pac. 111; *Bradford v. Adams,* 73 Wash. 17, 131 Pac. 449; Warvelle, Vendors (2d. ed.), 996.

Nor can the vendor evade responsibility by contending that he did not himself know the exact location of his own land, and that he undertook to procure agents to point out his own land. Furthermore, there is evidence in this case justifying the belief that appellants Sweitzer did know that the lands pointed out belonged to a relative and did not belong to appellants.

Appellants contend that their demurrer to respondent's complaint upon the ground that there was a defect of parties plaintiff, in that Eva J. Stevens, wife of the plaintiff, should be a party thereto, should have been sustained and that the court erred in overruling the same.

Respondent, in his complaint, alleged that he is the husband of Eva J. Stevens, but that he owned in his own right the property which was to be exchanged.

This manner of alleging ownership is pleading a conclusion of law, but it has always been held to be customary and sufficient as an allegation of ownership without deraigning title, in the absence of a motion to make more definite and certain. *Hester v. Stine,* 46 Wash. 469, 90 Pac. 594; *Freeburger v. Caldwell,* 5 Wash. 769, 32 Pac. 732, and we have held that the proper remedy, where the ownership is so pleaded, is by a motion to make more definite and certain. *Harris v. Halverson,* 23 Wash. 779, 63 Pac. 549.

The statute, § 5925, Rem. Code (P. C. § 1420), gives the right to every married person to acquire, hold,

enjoy, and dispose of every species of property, and to sue and be sued as if unmarried. There was no error in overruling the demurrer.

Appellants also claim that the court erred in denying their motion for security for costs. Even if erroneous, this denial works no harm to appellants and is therefore not prejudicial.

Judgment affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16329. Department One. November 2, 1921.]

NORTHERN GRAIN WAREHOUSE COMPANY, *Appellant*, v. NORTHWEST TRADING COMPANY, *Respondent*.[1]

SALES (88)—OPERATION AND EFFECT—WHEN TITLE PASSES—DELIVERY TO CARRIER. A c.i.f. contract, although the term may be used in connection with the price of the commodities sold, is one passing title to the buyer on delivery of the commodities to the carrier, and he cannot hold the seller liable for injuries to the goods in transit.

SAME (88)—SHIPPING DOCUMENTS—DELIVERY OF BILL OF LADING. Delivery of shipping documents and insurance policies covering a shipment of goods under a c.i.f. contract need not be made until a reasonable time after shipment, in order to complete the transaction.

SAME (88) — DELIVERY TO CARRIER — OWNERSHIP OF GOODS — PURCHASE AND RESALE BY VENDOR. The fact that a trading company is not the owner of goods at the time of sale, but fills the order by purchase in a foreign market, will not affect the question of the passing of title to the buyer from the trading company as of the date of delivery to the carrier.

Appeal from a judgment of the superior court for King county, Smith, J., entered July 15, 1920, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

[1]Reported in 201 Pac. 903; 204 Pac. 202.

Wright, Kelleher, Allen & Hilen and *William H. Gorham,* for appellant.

Piles & Halverstadt, for respondent.

MACKINTOSH, J.—On December 10, 1917, the following contract was entered into between the appellant and respondent, whereby the appellant purchased from the respondent the goods therein described:

COMMODITY: Wheat Bags.
QUANTITY: 100,000.
QUALITY: Best Grade.
SHIPMENT: March/April, 1918, from Calcutta.
PRICE: $0.17 each c. i. f. Seattle.
TERMS: Sixty Days Sight Draft acceptance on presentation with documents attached.
MARKED: N. W. T. Seattle 3041/A
REMARKS: Sold through Chas. H. Lilly & Company.

At the time the contract was entered into, the respondent had purchased from Becker, Grey & Company of Calcutta, wheat bags sufficient to cover the amount of this contract, and had established credit in London sufficient to protect Becker, Grey & Company. In the spring of 1918, Becker, Grey & Company shipped the goods on board the "Fuca Maru," consigning them to the "Textile Alliance" "account Northwest Trading Company." On June 3, 1918, the goods arrived at Seattle, and on June 6 the respondent notified the appellant of the arrival and enclosed a guaranty approved by the "Textile Alliance." On June 14 the respondent discovered part of the goods were damaged, but failed to notify the appellant of that fact. The respondent, on June 24th, not having the bill of lading, gave to the carrier an indemnity bond, and on June 26th procured from the carrier's warehouse an order made to itself which it endorsed to the appellant and attached the same to a draft which was presented by the respondent to the appellant, who ac-

cepted the draft and thereby obtained possession of the warehouse order, and on the following day took actual possession of the goods, when it learned of the damaged condition of a portion of them. On this same day, June 27th, draft was received from Becker, Grey & Company with the documents attached. The respondent obtained the documents and procured a release of the indemnity bond, which had been given to procure the warehouse order, by delivery of the bill of lading. While the goods were in transit the appellant, a couple of times, made inquiry of the respondent as to "our 100 bales purchased from you," in reply to which the respondent twice recognized the bags as being the property of the appellant.

The consignment of the goods by Becker, Grey & Company to the "Textile Alliance" is explained by the fact that, during the war times, the goods were necessarily so consigned by reason of the President's proclamation and order of the War Trade Board, which required that goods of the character in question be so consigned in order that the "Textile Alliance" might approve of the sale and delivery of the goods. Owing to war conditions, the bill of lading did not take the usual course, and it was by reason of those conditions that, in lieu of the bill of lading being delivered to the appellant, the documents above referred to were used and the delivery made in the manner described. This course was pursued in order to facilitate the physical delivery of the bags to the appellant.

The testimony shows insurance had been written upon the bags under a blanket policy which was in effect during the months in which the goods were shipped and were on the seas.

Somewhere on the voyage of the "Fuca Maru" the goods were injured by sea water, and this action is

brought for the purpose of determining who shall bear the loss. The appellant is seeking damages because 27,000 of the 100,000 bags were delivered in damaged condition, its position being that the title had not passed at the time the damage occurred, while the position of the respondent is that, under the contract as above set forth, title had passed at the time of delivery to the carrier in Calcutta. The bare question in this case is as to the effect of that contract.

The respondent's contention is that this is a "c. i. f." contract, and that, in accordance with the established rule, under such a contract a delivery is complete when the goods have been actually delivered to the carrier for transportation; while the appellant claims that the use of the letters "c. i. f." in the contract refer only to the matter of price, and that title did not pass until delivery in Seattle, under the same restrictions as would be applied had those three letters not been used in the contract, and that in this case no title passed until either actual or constructive delivery of the goods by presenting the bill of lading with draft attached and the purchaser had accepted the draft and thereby obtained the bill of lading.

It is appellant's argument that this case is governed by what this court said in the case of *Collignon & Co. v. Hammond Milling Co.*, 68 Wash. 626, 123 Pac. 1083; and it quotes that part of the opinion which follows:

"There is nothing in a c.i.f. sale differentiating it from other sales, so far as the question under consideration is concerned. The distinguishing feature of such a sale is that the contract price includes the costs of insurance and the freight to destination in addition to the invoice cost of the goods. An offer and acceptance on that basis, therefore, does not, more than in other sales, determine as between buyer and seller when or where the title to the goods passes from buyer

to seller. That depends upon the intention of the parties to be determined as in other cases."

The expression of this court in that case is, if read literally, not supported by the authorities and has, in fact, been overruled by our decision in *Andersen, Meyer & Co. v. Northwest Trading Co.*, 115 Wash. 37, 196 Pac. 630, where we had under consideration a "c.i.f." contract. In the *Collignon* case, *supra,* a "c.i.f." contract was considered without any reference to the English and American authorities which have passed upon this form of contract under the law merchant, and which have established, with scarcely a dissenting opinion anywhere, that a "c.i.f." contract, although the term may be used in connection with the price of the commodities, yet affects the title on delivery. These contracts being so generally used have received a uniform interpretation, and it will not do to introduce confusion into commercial activities by establishing a rule which is inharmonious with the general custom of merchants throughout the trading world.

In addition to the cases cited in the *Andersen, Meyer* case, *supra,* reference may be made to the very recent case of *Smith Co. v. Marano,* 267 Pa. 107, 110 Atl. 94; *Law & Bonar v. British-American Tobacco Co.* (1916), 2 K. B. 605; *C. Sharpe & Co. v. Nosawa & Co.* (1917), 2 K. B. 814; *Mambre Saccharine Co. v. Corn Products Co.* (1919), 1 K. B. 198; *Stroms Bruks Aktie Bolag v. Hutchison* (1905), A. C. 515.

The use of the expression in the *Collignon* case, *supra,* that the determination of when title should pass, "depends upon the intention of the parties" in a sale "c.i.f." is not supported by the authorities and is misleading, unless by it is understood that an intention contrary to that established by the use of "c.i.f." must

be unmistakably shown in the contract itself, as the courts hold that the use of the term "c.i.f." establishes the transfer at the time of delivery to the carrier, even though the contract may call for delivery at some other time. In the *Law & Bonar* case, *supra,* the English court held that a provision in the contract that for a period after shipment the goods were to be at the risk of the seller was repugnant to the "c.i.f." terms, and that although that clause appeared in the contract, it could have no application to a transaction which was also "c.i.f."

In the case of *Smith Co. v. Moscahlades,* 193 App. Div. 126, 183 N. Y. Supp. 500, which is quoted in the *Andersen, Meyer* case, the New York court held that, in a sale "c.i.f.," a statutory provision of the New York sales act that property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon was, "unless a different intention appears," inapplicable, for a "c.i.f." contract imports an intention differing from that set out in the statute, and falls within the exception.

In the case of *Smith Co. v. Marano, supra,* the defendant agreed to buy merchandise from the plaintiff at a price "c.i.f." and the goods were destroyed by submarine while in transit on the high seas. The defendant was held liable for the purchase price, as delivery to the carrier was delivery to the defendant. In that case no particular emphasis was placed on the delivery of the shipping documents, it appearing they were actually tendered to defendant with sight draft for the amount due.

In *Smith Co. v. Moscahlades,* above, it was further held that a delivery to the carrier of goods bought "c.i.f." was an unconditional appropriation and the title passed to the buyer, even though the purchase price was payable before the buyer was entitled to the

actual delivery of the goods, or the delivery of the bill of lading, which in that case was made to the order of the seller and endorsed by it to the buyer.

In the case of *Mambre Saccharine Co. v. Corn Products Co., supra,* it was held that the seller could effectively tender the proper documents to the purchaser and claim delivery, although he knows at the time of the tender the goods have been lost in transit.

Delivery of the shipping documents and the insurance policies, in order to complete the transaction, need not be made until a reasonable time has elapsed. In this case documents which entitled the appellant to physical possession of the property, though other than the bill of lading, were delivered to the appellant, and it is in no position to complain that the bill of lading was not delivered.

Some point is made of the fact that shipment from Calcutta was not made to the appellant as consignee, and that the respondent was not the owner of the goods sold to the appellant. We see no merit in this position, for it is a common commercial transaction for merchants to make purchases and re-sell the goods to their customers without first getting actual physical possession of the goods themselves, and that is what was done in this case; the goods were distinctively marked and set aside to the appellant, and although they may have been consigned to the account of the respondent, nevertheless were so segregated and distinguished as to have been appropriated to the appellant's contract. The bill of lading which was made out to the respondent was, immediately upon its receipt, endorsed and attached to the draft, and, as was said in the *Marano* case, *supra,* this merely indicated "appellee's intention to retain property in the goods to secure performance by the defendant of his promise to pay for them, and did not, by the express words of

the sales act, relieve him from the risk that was upon him from the time the goods were delivered to the carrier." The title was transferred from Becker, Grey & Company to respondent and from respondent to appellant at the time the goods were placed on board the "Fuca Maru" for transportation, although the appellant was not entitled to the physical possession of the property until it had received the documents and complied with the terms of the contract. As the trial court said in a memorandum opinion, "there was no hint or reservation that the title would pass upon payment of the draft or subsequent approval of the plaintiff."

The judgment is affirmed.

PARKER, C. J., BRIDGES, and HOLCOMB, JJ., concur.

ON REHEARING.

[*En Banc.* February 6, 1922.]

PER CURIAM.—This cause was reargued before the court *En Banc* on January 23, 1922. Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of Department One, the judgment is affirmed for the reasons therein stated and as therein directed.

[No. 16418. Department Two. November 5, 1921.]

WASHINGTON CRANBERRY GROWERS ASSOCIATION, *Respondent*, v. A. B. MOORE, *Appellant*.[1]

CONTRACTS (45) — MONOPOLIES — VALIDITY—RESTRAINT OF TRADE—CONTROLLING PRODUCTION AND PRICE OF COMMODITY. A contract requiring a grower of cranberries to ship all the crop grown by him to an association for the purpose of marketing and sale with the object of enabling the growers to obtain a uniform price for their product, but which does not operate to limit production or control the price in any particular locality, is not void as against public policy, nor as contravening art. 12, § 22, of the state constitution against monopolies, nor the Federal anti-trust act.

INJUNCTION (24)—CONTRACTS—RESTRAINING BREACH—DAMAGES AS ADEQUATE REMEDY. Injunction will lie to restrain the breach of a contract, thereby indirectly effecting its specific performance, where the intent was to rely on performance and the contract is one which could not be specifically enforced in a court of equity by reason of the fact that it would require the performance of continuous duties.

SAME (24). A breach of a contract may be properly restrained, where it provides for damages in case of a grower's failure to deliver his crops to an association for marketing, merely as an estimate, but recites it is impossible to fix the actual damages sustained in case of a grower's failure to abide by the agreement, and the purport of the whole contract shows that the parties intended to rely upon the performance of the covenant and not merely on the payment of damages for the breach thereof.

MACKINTOSH, HOLCOMB, and HOVEY, JJ., dissent.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered December 18, 1920, in favor of the plaintiff, in an action for an injunction, tried to the court. Affirmed.

Welsh & Welsh, for appellant.

John J. Langenbach, for respondent.

MAIN, J.—The purpose of this action was to restrain the breach of a contract. The trial resulted in a permanent injunction, from which the defendant appeals.

[1]Reported in 201 Pac. 773; 204 Pac. 811.

The Washington Cranberry Association is a corporation organized under the laws of this state and is engaged in the business of marketing cranberries for those with whom it has contracts, and in some instances for independent growers. The appellant had entered into a contract with the corporation by which he agreed to deliver to it all the cranberries grown by him in Pacific county on land owned by him. The contract provides as follows:

"Witnesseth: That the grower, for and in consideration of one dollar paid him by the association, receipt of which is hereby acknowledged, and of the covenants and agreements herein contained, hereby nominates, appoints and agrees to employ the association as exclusive sales agents for the purpose of selling and marketing the entire crop of cranberries now growing or which shall be grown for shipment by the grower or for him, or in which he may have any interest as landlord or tenant, upon all those certain tracts of land situated in Pacific county, Washington, described as follows: Metes and bounds in section 27, township 16, north of range 11, west of Willamette Meridian, during the year 1916 and every year thereafter continually, provided, however that the grower may cancel this contract on the 15th day of January in any year by giving notice in writing to the association in writing at least 15 days prior to that date. Upon giving notice the grower shall, prior to said 15th day of January, pay any and all indebtedness due from him to the association and deliver his copy of the said contract to the manager of the association, and the same shall thereupon be cancelled.

"The grower agrees at his own expense to cultivate, care for and harvest said crops. All fruit to be delivered by the grower at the warehouse of packing station of the association, at such place and at such time and in such manner as may be designated by the said association, which shall give notice to the grower for such delivery.

"In the event that grower shall fail to fulfill any or all of the requirements set forth in the foregoing paragraph, the association through its manager shall give to the grower written notice setting forth the default of the grower, and in event the default so specified shall not have been overcome or corrected within ten (10) days following delivery of such written notice to grower, it is mutually agreed that the association may consider this contract as cancelled, and shall be relieved from further responsibility with regard to marketing the grower's fruit hereunder.

"The grower fully understands that the purpose, among others, of this agreement, is to maintain and increase to its greatest efficiency the association as well as the Central Selling Agency with which it is now or hereafter may be affiliated, and to accomplish this purpose it is necessary that he shall strictly and fully comply with and perform the stipulations and agreements on his part agreed herein to be performed, and therefore he hereby stipulates and agrees that he will not sell or otherwise dispose his said fruit to any other firm, person or corporation other than the aforesaid association; and it is hereby further mutually agreed that inasmuch as it is impossible at this time to fix and estimate the actual damage which will be sustained by the association in the event that the grower shall fail to abide by his agreement to market his said fruit through the association, such damages are hereby estimated and agreed upon as one dollar per box for each box of cranberries grown or sold by the grower, which sum shall be allowed in any action brought by the second party to recover damages for the breach of this agreement by the grower should the association elect, as it may elect, to bring such action.

"In consideration of its appointment as exclusive sales agent of growers' fruit crop, as above set forth, and in further consideration of the agreements made by the grower with the association as hereinbefore set forth, the association agrees to receive, ship and sell all of said fruit to the best possible advantage. To promptly remit returns therefor, less its regular charge for aforesaid services and for any other deduc-

tion, including money, due for advances for supplies furnished by the association to the grower, which indebtedness grower agrees may be treated by the association as a first lien on the proceeds from his fruit, and payment therefor to be deducted accordingly.

"In witness whereof the association has caused this contract to be signed and sealed in its name and behalf by its president and its secretary, and all other parties have hereto affixed their individual signatures. Washington Cranberry Growers' Association, C. K. Cooper, President. Attest: W. M. Rounds, Secretary. A. B. Moore."

The Columbia River Cranberry Association is a corporation engaged in the same business as that of the Washington Cranberry Association, as is also the Oregon Cranberry Association, a corporation. After the contract above referred to was made, the three corporations named entered into a contract whereby there was created what is referred to as the Pacific Cranberry Exchange, and appointed one L. S. Martin as the exclusive agent for the sale of all berries controlled by the three corporations. The cranberry exchange was composed of three members, a representative of each of the corporations. In the contract they are referred to as "the associations." It is provided that the cranberries shall be delivered f. o. b. cars at points designated by Martin, and that he agrees that

"he will immediately upon acceptance by his representative of cranberries, upon surrender of bill of lading, advance to the Pacific Cranberry Exchange, the agent of said associations, the sum of $2.00 per box of the size heretofore indicated, said bill of lading hereinabove mentioned shall be forwarded by said Pacific Cranberry Exchange, with draft attached to the Bank of California, of Portland, Oregon.

"The representatives of the said L. S. Martin shall have access to the warehouses of the associations and to the warehouses or store-rooms of the individual

members of the associations, to determine the quantity, conditions and quality of berries available at any given time. A representative of the Pacific Cranberry Exchange may at any reasonable time, have access to the books of the said L. S. Martin, at his offices in Portland, Oregon, for the purpose of checking sales and returns made by the said L. S. Martin.

"All returns shall be made to the Pacific Cranberry Exchange, the agent of said associations, on or before thirty days after the expiration of the month in which the berries are shipped to the said L. S. Martin.

"The associations agree that the said L. S. Martin shall receive a five per cent commission on all gross sales of all berries sold by it to jobbers in the states of Oregon and Washington, and six and one-half per cent on all other berries sold by the said L. S. Martin and the said L. S. Martin hereby agrees to accept said commissions in full settlement for his services in the sale of said berries.

"The said L. S. Martin shall only be liable for actual negligence on his part, and no liability shall be attached to him by reason of damages caused to the associations or to individual members thereof, by strikes, embargo, shortage of equipment, or any other cause beyond the control of said L. S. Martin by use of reasonable diligence.

"It is understood and agreed that the fullest cooperation of the associations and of the Pacific Cranberry Exchange will be extended to the said L. S. Martin in the handling and marketing of said berries.

"All sales shall be made at the market price, or at a price to be mutually agreed upon by said L. S. Martin and the Pacific Cranberry Exchange."

In Pacific county there were approximately eighty cranberry growers, and sixty of these had contracts with the respondent similar to the one set out. After the contract was entered into and during the year 1920, the appellant produced 1,300 boxes of cranberries, and five hundred of these were sold to parties other than the contract provided. As above stated,

this action was brought to restrain the appellant from selling cranberries to parties other than the respondent. The appellant makes three principal contentions. First, that the contract is void at common law as against public policy; second, that it is contrary to art. 12, § 22, of the constitution of this state, which is a section covering the matter of monopolies and trusts; and third, that the contract is void as being in contravention of the Sherman Anti-Trust Act passed by the Federal Congress on July 2, 1890 (U. S. Stat. at Large, vol. 26, p. 209, ch. 647).

To determine whether the contract is void for any of the reasons stated it is necessary to read the contract in connection with the procedure under it and the result which was produced thereby. The appellant contends that a monopoly is created, trade restrained, the output of cranberries limited and prices are controlled. It may be admitted that, if this is the effect of the contract and the business transacted under it, it would be void and unenforcible. The contract required the appellant to deliver all cranberries grown by him to the respondent for marketing until it should be terminated in accordance with the terms therein stated. The purposes of the contract, among others as stated therein, are to maintain to its greatest efficiency the association, as well as the central selling agency with which it is now or may be hereafter affiliated. The corporation is made the exclusive sales agent for the growers' fruit crop. The evidence shows that the purpose of entering into the contracts, of which the one above set out is one, was as follows:

Before the corporation was organized, certain growers at times put upon the market cranberries of an inferior grade and this caused merchants to refuse to buy berries from Pacific county. In order to

avoid this situation it was necessary to enter upon an advertising campaign to stimulate the use of berries and to cause berries of uniform grade to be placed upon the market. Another purpose was to secure a uniform price and avoid flooding any one market, as would be done if a large quantity of berries was shipped to a particular point at one time. Under the selling agency, the quantity of berries going to any one market was regulated, and in this way tended to maintain, or "hold up," as the evidence shows, the price. It was also for the purpose of enabling all growers to receive for their berries a uniform price. There is nothing in the contract or the operation under it that limits the production or controls the price in any particular locality. While the selling agency was located in Portland, the berries handled through the cranberry exchange representing the three corporations came in direct competition with eastern berries as well as with the berries of independent growers. The cranberry association controlled about two per cent of the berries produced in the United States, the independent growers, thirty-two per cent, and the American Cranberry Exchange, which was an organization operating in New York and Chicago, sixty-five per cent. The berries sold through the selling agency in Portland created by the three corporations sold at the market price and the berries were shipped by the corporations to such points as Martin, the selling agent, designated. The evidence is that the price of the berries in the various markets was fixed and controlled by the American Cranberry Exchange. If the Pacific berries could not be sold for the same price as the eastern berries the selling agent, after conferring with the members of the exchange, would sell for a lesser price. The contract and the delivery of berries

under it not resulting in limiting the production, controlling or fixing of the price in any particular market, cannot be said to be void as against public policy, or under the constitutional provision above referred to, or under the anti-trust act.

The question as to when a contract is a restraint of trade was fully discussed in *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522. It was there recognized that it was difficult to state the rule which would cover all cases, and that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare, must be considered in determining the validity of a contract. It was there said:

"The fact that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare must be considered, and that of all circumstances, the dominant consideration is the welfare of the public, makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of any such contract as that here involved. Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy."

In *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213, 106 Am. St. 452, it was stated that, in de-

termining the validity at common law of a combination claiming to be in restraint of trade, the true test is "whether they afford fair and just protection to the parties thereto or whether they are so broad as to interfere with the interests of the public." In *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, in determining whether a contract was void at common law or under the anti-trust act, the test applied was whether there was a reasonable restraint of trade,

"considering whether the restraint is such only as a broad and fair protection of the interests of the public in favor of whom it is given and not so large as to interfere with the interests of the party. Whatever restraint is larger than the necessary protection of the public requires can be of no benefit to either. It can only be oppressive which is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

A large number of cases are cited in the briefs where contracts have been held void as being a restraint of trade, but it does not seem necessary to review these in detail. So far as we are informed, no case holds that a contract is void which does not limit the production or control or fix the price in a particular market. As above pointed out, the contract here under consideration, considered in connection with the evidence showing the operation under it, neither limits the production or fixes the price. The cases of *Santa Clara Valley Mill & Lumber Co. v. Hays*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. 211, and *Cravens v. Carter-Crume Co.*, 92 Fed. 479, are cases where the combinations there in question limited the production and increased the price, and are therefore not in point in this case.

The next question which arises is whether the respondent is entitled to injunctive relief. The appellant contends that there should be recourse only for dam-

ages. The purpose of the action was not to enforce specific performance directly, but to accomplish that indirect result by restraining the appellant from selling berries to any other person than the respondent. It will be admitted that if the contract, by its terms, shows an intent to rely upon damages, or if there is an adequate remedy at law, injunctive relief cannot be had. The contract provides that, to accomplish its purpose, it is necessary that the appellant strictly and fully comply with and perform the stipulations and agreements on his part. While the contract provides for damages, it also recites that it is impossible to fix and estimate the actual damage sustained in event the grower shall fail to abide by the agreement, and the damages are only estimated. The contract, we think, fails to show an intent of the parties that, in the event of breach, the only recourse would be an action for damages. There was not an adequate remedy at law because an action for damages would not be sufficient to protect the respondent and the other growers which it represented in accomplishing the purposes of the undertaking. Those purposes are fully set out above and need not here be repeated. The fact that the contract is one which could not be specifically enforced in a court of equity by reason of the fact that it would require the performance of continuous duties does not prevent the court from entering an injunction restraining its breach, which indirectly accomplishes the same result. *Western Union Telegraph Co. v. Union Pacific R. Co.*, 3 Fed. 423; *Chicago & Alton R. Co. v. New York, L. E. & W. R. Co.*, 24 Fed. 516; *American Electrical Works v. Varley Duplex Marget Co.*, 26 R. I. 295, 58 Atl. 977. In the case last cited, upon this question it was said:

"The respondent, however, contends that the injunction should not be granted, because it would result

in compelling indirectly a specific performance of the contract in the case, where the court would not directly order such performance.

"We do not think that this contention is in accord with the best and most modern authorities. The following cases, amongst others which might be cited, sustain the complainant's position. (Citing numerous authorities.)

"A very clear and well-considered statement of the law upon the question under consideration according to the most modern authorities is to be found in the opinion of Judge Lowell in *Singer Sewing Machine Co. v. Union But. & Em. Co., supra,* in which he says: 'The two points of law are not without difficulty. The relief asked is specific performance and injunction. It is argued with great ability by the defendants, that the complainant is not entitled to specific performance, and that, therefore, it can not have an injunction which is merely auxiliary. Granting the premises, I am not prepared to concede the conclusion. If the court can not order a contract for the making of button-hole machines to be specifically performed by reason of the impossibility of superintending the details of such a business, it does not follow that the bill may not be retained as an injunction bill. It was formerly thought that an injunction would not be granted to restrain the breach of any contract unless the contract were of such a character that the court could fully enforce the performance of it on both sides.' Judge Lowell here examines the authorities and the development of the modern rule, and then proceeds: 'I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it.' "

The fact that the contract provides that, in case of breach, the damage shall be as there admitted, does not of itself conclusively establish that the parties contemplated that, upon the breach thereof, damages would be an adequate remedy. It is a question of intention in each case, to be deduced from the whole instrument and the circumstances, and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of breach, the contract will be enforced. *Diamond Match Co. v. Roeber,* 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Harris v. Theus,* 149 Ala. 133, 43 South. 131, 123 Am. St. 17, 10 L. R. A. (N. S.) 204; *Wilkinson v. Colley,* 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114; *Heinz v. Roberts,* 135 Iowa 748, 110 N. W. 1034; *Ropes v. Upton,* 125 Mass. 258; *Zimmermann v. Gerzog,* 13 App. Div. 210, 43 N. Y. Supp. 339.

Considering the terms of the contract and all the attendant circumstances, we are of the opinion that it was not intended by the parties thereto that the damages claimed therein should be the only price of the appellant's breach of the agreement, and that the remedy at law would not be adequate.

The judgment will be affirmed.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

ON REHEARING.

[*En Banc.* February 21, 1922.]

PER CURIAM.—This cause was reargued before the court *En Banc* on January 25, 1922. Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of Department Two, the judgment is affirmed for the reasons therein stated and as therein directed.

MACKINTOSH, J. (dissenting)—For the reason that I think the opinion in this case states an unsound principle of law, I am forced to dissent.

Upon the question whether the contract under consideration is void as against public policy, or the provisions of the state constitution in regard to monopoly and trusts, or under the Sherman Anti-Trust Act, there may be a very serious question, and that the contract should be held void there is supporting argument in the recent decisions of the United States supreme court in the cases of *American Column & Lumber Co. v. United States,* U. S. Adv. Ops. 1921-22, p. 159, decided on December 19, 1921, and *Federal Trade Commission v. Beech Nut Packing Co.,* U. S. Adv. Ops. 1921-22, p. 178, decided January 3, 1922. But I am not so much concerned with that question as with the other question decided in this case, and am willing to assume that the contract is a valid and enforcible one.

It is elementary, and will be conceded to be the general rule by every one hearing it stated, that courts of equity will not enjoin the breach of contracts. Where the contracts provide for liquidated damages, or, if not so providing, the damages can be ascertained which will compensate for the breach, the party not in fault will be left to sue for such damages, or he may compel specific performance. Where a contract provides for liquidated damages, specific performance is not available in some jurisdictions, but after a consideration of this question with our recent case of *Asia Investment Company v. Levin,* decided February 23, 1922, to be reported in 118 Washington Reports (204 Pac. 808), we are committed to what seems to us to be the better rule; that, although the contract agrees upon liquidated damages, still, upon a breach by one party, the other party has the option of suing for the recovery of such damages, or in equity to enforce specific performance. But there are certain classes of cases in which courts of equity will not order specific perform-

ance, one of those classes being where the equity court would be compelled to take over and conduct the business, or to engage in such constant supervision of the execution of the details of the contract as to be a burden upon the court. In those cases the party to the contract against whom the breach has occurred is relegated to his action at law for damages, and it is to avoid such action that injunctions are sought, which will indirectly have the effect of, at least, partially compelling performance.

But courts of equity will not beat around the bush in this manner unless the law action for damages is not sufficient, and they hold that, where the contract provides for liquidated damages, such damages are sufficient. Of course, within this rule fall those cases where the party committing the breach is insolvent, it being apparent that an action at law against him for breach of his contract would furnish inadequate relief; so, in insolvency cases, we find courts of equity enjoining the breach of contracts where the court cannot order specific performance.

No injunction should be allowed to prevent the breach of the contract before us. The contract itself, after pledging the grower to "strictly and fully comply with and perform the stipulations and agreements on his part herein to be performed," states that it is "hereby further and mutually agreed that, inasmuch as it is impossible at this time to fix and estimate the actual damage which will be sustained by the association in the event that the grower shall fail to abide by his agreement to market his said fruit through the association, such damages are hereby estimated and agreed upon as one dollar per box for each box of cranberries grown or sold by the grower . . . ."

No language more explicit or definite could have been used to create a stipulation for liquidated dam-

ages. The provision meets all of the requirements that have been set down by this court as constituting a provision in a contract one for liquidated damages. We therefore have a case where the parties themselves have left nothing to be decided in an action at law against the grower, except the question of whether he has or has not breached his contract. The damages flowing from such a breach, if it is established, have been absolutely determined, and the courts are uniform in holding that such a determination by the parties constitutes adequate compensation for the breach. In this case, however, the court, in substance, says that the provision for liquidated damages is without effect, and that a breach of the contract will be enjoined, although the parties themselves have determined upon the measure of damages.

This court should not substitute its judgment as to whether damages are adequate or inadequate, contrary to the judgment of the parties to the contract themselves, who have formally agreed that damages in a certain amount are adequate, such agreement as to the amount of damages having been made in full view of all the purposes which the contract was seeking to accomplish, and the indefiniteness of the amount of damages a breach might occasion.

When the parties have agreed on the amount, it will not do for this court to say that it is inadequate. No stipulation for liquidated damages is set aside for that reason, but may be set aside for the reason that they are so excessive as to amount to a penalty. The parties knew, as well as this court, "that it is impossible to fix and estimate the actual damage sustained, in event the grower shall fail to abide by the agreement and the damages are only estimated." Yet this is the situation in nearly all cases where liquidated

damages are agreed upon. The parties knew, as well as this court, that they desired "to protect the respondent, and the other growers which it represented, in accomplishing the purposes of the undertaking," for in the contract they said, "the grower fully understands that the purposes, among others, of this agreement is to maintain and increase to its greatest efficiency the association . . . . . and to accomplish this . . . . . he agrees that he will not sell . . . . his fruit to any other firm, etc. . . . . and it is . . . . agreed that, inasmuch as it is impossible at this time to fix and estimate the *actual damage* . . . *such damages* are estimated and *agreed upon* as $1 per box . . . which sum shall be allowed in any action brought . . . to recover damages for the breach of this agreement." What did they mean? Were they so incompetent to contract for themselves, and so unfamiliar with the subject-matter with which they were dealing, and so unskilled in expressing their ideas that this court will say their language is futile and rewrite the contract as it thinks it should have been? To do so is to violate too many sacred rules of contracts.

The decision is based upon the case of *Harris v. Theus,* 149 Ala. 133, 43 South. 131, 123 Am. St. 17, 10 L. R. A. (N. S.) 204, and others noted in connection with that case in 10 L. R. A. (N. S.) 204. It seems to me that those cases can be clearly distinguished from the case at bar. The majority of them are cases in which either a professional or business man has sold out his practice or business, and has agreed with the purchaser not to resume business or practice in competition with the purchaser for a certain definite period of time. In such cases the courts have enjoined the seller from committing a breach of his contract.

The exception to the rule in that class of cases has always been recognized as sound. The principal case

of *Harris v. Theus, supra,* was a case where the seller of certain lands agreed not to engage in a certain business within ten miles of the place, so long as the purchaser should be engaged in that business.

In the case of *Diamond Match Co. v. Roeber,* 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, a contract was made by the seller with the purchaser that he would not, within any time during the next ninety-nine years, engage in the manufacture of friction matches, except in certain specific territories, and breach by the seller was enjoined. The court said:

"It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance. . . . It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced."

Ropes v. Upton, 125 Mass. 258, was a case where the parties were partners and one sold to another his interest and good will, and agreed not to carry on business in the same place, and on attempting to do so was enjoined.

Heinz v. Roberts, 135 Iowa 748, 110 N. W. 1034, was an agreement by an attorney who sold his practice and represented that he would not practice his profession within certain territory. Injunction against the breach was granted.

Wilkinson v. Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114, was a case of a physician who sold out his practice and agreed not to return thereto for a period of ten years. In less than four years he resumed prac-

tice in the same community where he had originally practiced, and an injunction was granted against this conduct.

In *Zimmermann v. Gerzog,* 13 App. Div. 210, 43 N. Y. Supp. 339, the vendor of a business agreed that he would not enter a similar business for a given period of time. The breach of this covenant was enjoined.

The other cases cited in the majority opinion are ones where there had been no provision for liquidated damages, or where the remedy at law was inadequate.

The case of *American Electrical Works v. Varley Duplex Marget Co.,* 26 R. I. 295, 58 Atl. 977, presented a situation where the respondent had contracted to put machinery in the appellant's factory, to be used for their joint benefit, and the complainant, in reliance on its right to use the machinery, had, in addition to expending money for material, entered into contracts to supply large quantities of the product to be manufactured thereby. The court held that damage for failure to perform was not susceptible of computation, and defendant should be enjoined from removing the machinery, although the contract between the parties could not be enforced by specific performance.

Chicago & Alton R. Co. v. New York, L. E. etc. Co., 24 Fed. 516, was a case where an injunction was granted to restrain breaches of negative covenants, which resulted in compelling the observance of affirmative covenants, the court saying, however, that equity would only interfere when the recovery of damages at law would inadequately redress the impending injury.

The case of *Western Union Tel. Co. v. Union Pacific R. Co.,* 3 Fed. 423, enjoined the violation of a contract which called for the performance of continuous duties involving the exercise of skill, personal labor and cultivated judgment, but for the reason that damages could not adequately be arrived at.

From the case of *American Electrical Works v. Varley Duplex Marget Co., supra,* an extensive quotation is contained in the opinion of the court, which quotation is composed largely of a quotation from the opinion of Judge Lowell in *Singer Sewing-Machine Co. v. Union Button-Hole etc. Co.,* Fed. Cas. No. 12,904. The court, in referring to the opinion of Judge Lowell, says, as appears in the quotation, "the question under consideration according to the most modern authorities is found in the opinion of Judge Lowell." The opinion of Judge Lowell was rendered in September, 1873, so that it cannot be said to be a review of extremely "modern authorities." Moreover, Judge Lowell himself, in the case of *Bickford v. Davis,* 11 Fed. 549, decided in April, 1882, referred to his former opinion in the *Singer Sewing-Machine* case, *supra,* recognizing it as being contrary to the general rule, saying, "as a general rule a court of equity will not order such a contract to be specifically performed . . . There are a few exceptions to this rule, as I said in the *Singer Sewing Machine* case . . . still, it is the general rule."

Passing now to a review of the cases which, to my mind, have squarely considered the question before us, and attempting to confine the consideration of them within reasonable limits, and on that account taking principally those from the United States supreme court, we find the following: In *Sun Printing etc. Ass'n v. Moore,* 183 U. S. 642, that court said:

"The naming of a stipulated sum to be paid for the non-performance of a contract is conclusive on the parties in the absence of a fraud or mutual mistake. Parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of the agreement."

In that case, Chief Justice White, in a most elaborate opinion, reviewed the entire question of liquidated damages, and shows that, where the parties have made certain what otherwise would be uncertain, by agreeing upon the amount of damages, such agreement is binding upon them.

In *Javierre v. Central Altagracia,* 217 U. S. 502, the supreme court of the United States held: Injunctive relief will not be granted in equity against disposal of sugar cane elsewhere than at the sugar factory designated in the contract with the growers, as a suit for damages will afford adequate relief.

The court saying:

"The doubt as to the relief granted below is more serious and in the opinion of the majority of the court must prevail. According to that opinion a suit for damages would have given adequate relief and therefore the appellee should have been confined to its remedy at law. Again, the court would not undertake to decree specific performance and to require and to supervise the raising of the crop and the grinding of the sugar for even the now remaining period of the decree. There is a certain anomaly in granting the half way relief of an injunction against disposing of the crops elsewhere when the court is not prepared to enforce the performance to accomplish which indirectly is the only object of the negative decree. There is too a want of mutuality in the remedy, whatever that objection may amount to, as it is hard to see how an injunction could have been granted against the appellee had the case been reversed."

In *Marble Co. v. Ripley,* 77 U. S. 339, the same court held in effect that there is a presumption that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation, and where the breach of the contract to transfer personal prop-

erty can thus be compensated, an injunction cannot be granted to prevent the breach.

In *Burdon Cent. Sugar Ref. Co. v. Leverich,* 37 Fed. 67, it was held:

"The breach of a contract by which defendant agreed to have her whole crop of sugar for two years refined at plaintiff's refinery may be adequately compensated by damages at law, and equity will not enjoin a violation of the agreement."

The court, in *Emerzian v. Asato,* 23 Cal. App. 251, 137 Pac. 1072, held that: On defendant's breach of a contract to care for and sell to plaintiff orange trees, plaintiff could not enjoin defendant from disposing of the same to others.

In *New Hartford Canning Co. v. Bulifant,* 78 App. Div. 6, 78 N. Y. Supp. 951, the court stated that one who agreed to sell and deliver corn cannot be enjoined from selling to another, although the purchaser alleged irreparable injury, the facts simply showing liability in damages for failure to deliver it, which could be recovered in an action at law.

See, also, to the same general effect: *Electric Lighting Co. v. Mobile etc. R. Co.,* 109 Ala. 190, 19 South. 721, 55 Am. St. 927; *Starnes & Mosley v. Newson,* 1 Tenn. Ch. 239; *Bomer Bros. v. Canaday,* 79 Miss. 222, 30 South. 638, 89 Am. St. 593, 55 L. R. A. 328; *General Elec. Co. v. Westinghouse Elec. & Mfg. Co.,* 144 Fed. 458; *Berliner Gramophone Co. v. Seaman,* 110 Fed. 30; *Grape Creek Coal Co. v. Spellman,* 39 Ill. App. 630; *Lone Star Salt Co. v. Texas etc. R. Co.,* 99 Tex. 434, 90 S. W. 863; *Taussig v. Corbin,* 142 Fed. 660; *Hair Co. v. Huckins,* 56 Fed. 366.

Judge Cushman, in *Blue Point Oyster Co. v. Haagenson,* 209 Fed. 278, held that a court of equity will not interfere in a contract by which the owners of oyster beds agreed to sell their entire product for a

term of years, at stated prices per sack, with a provision that they would sell to no one else, the contract specifying the quantity and quality of each sack, specific performance being denied for the reason that the character of the case was such that continuous supervision of the court would be required during the term of the contract, and injunction being refused for the reason that complainant had an adequate remedy at law, the oysters which were the subject of the contract having an ascertainable market value. Judge Cushman cites over one hundred authorities in that opinion.

Last, but not least, we trust, this court itself has decided this question squarely in the case of *Gardiner v. Gyorog,* 109 Wash. 660, 187 Pac. 318. In that case a contract was considered for the sale of three tons of Cascara bark, and also all bark defendant "shall peel or have for sale during the season." The action was brought to enjoin the defendant from selling the bark to any one other than the plaintiff. The court said:

"The evidence shows that the appellant could have purchased this bark at an advance of probably one cent per pound over the contract price. In other words, the appellant in an action at law for damages, could recover one cent per pound, or $6.75. The appellant insists that respondent is insolvent . . . [we notice in the instant case there is no suggestion or mention of any kind of insolvency] but we think it is not plain, even upon these facts that the respondent could not respond to whatever damages the appellant might recover in an action at law for damages. 'The general principle by reason of which a litigant is remitted to a court of law if he has an adequate and efficient remedy in that tribunal, is also the test of his right to an injunction restraining the breach of a contract. The court must be satisfied of the inadequacy of the legal remedy before it will grant the desired relief. . . . It seems also that the contract must be one on which an action

at law could be maintained. . . . ' The court below was not satisfied of the inadequacy of the legal remedy, and we are of the opinion was amply justified by the proof upon this question."

To my mind, this case cannot be distinguished from the case at bar, and the opinion of the majority does not attempt to do so, for it does not even refer to it.

This dissent has already extended itself possibly unnecessarily, for the reason that it is only expressing an idea of what the law ought to be, rather than what it is, in view of the decision of the majority of the court; but to summarize the situation, it would appear that the law ought to be that, where parties have agreed in a contract upon liquidated damages, and the contract is of such a nature that specific performance cannot be decreed, for the reason that such decree would result in the continuous supervision of the court, or in the constant invocation of the court's orders to complete the performance, the courts will say that there is an adequate remedy at law, and that the extraordinary remedy of injunction will not be applied; that the indirect specific performance of contracts will not be compelled by means of injunction where the law court can afford adequate relief. To this rule there only seems to be the exception, which has been noted when referring to the authorities relied on by the majority opinion, of contracts where the seller has agreed not to engage in business in competition with the buyer, and possibly, save for a few sporadic exceptions not heretofore noted, the rule I contend for is supported by all the authorities. For these reasons, I dissent.

HOLCOMB, J. (concurring)—I concur. This opinion should be the prevailing one.

HOVEY, J., concurs with MACKINTOSH, J.

[No. 16615. Department Two. November 5, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Silver Lake Railway & Lumber Company, Plaintiff,* v. THE PUBLIC SERVICE COMMISSION *et al., Defendants and Respondents,* DIRECTOR OF PUBLIC WORKS *et al., Substituted Defendants and Respondents.*[1]

CARRIERS (2)—WHO ARE COMMON CARRIERS—RAILROADS—POWERS OF PUBLIC SERVICE COMMISSION. The status of a carrier as a common carrier is a question of fact to be determined by the courts upon the evidence presented in the record, irrespective of the finding of the public service commission.

SAME (2)—EFFECT OF CHARTER PROVISIONS. Power conferred on a corporation by its charter to perform service as a common carrier will not establish its character as a common carrier, where it has never undertaken to exercise that power.

SAME (2) — EVIDENCE — SUFFICIENCY. The fact that a logging corporation brought an action to condemn land for a railroad right of way, while evidence to be considered, would not be sufficient in itself to establish a status as common carrier contrary to the actual facts.

SAME (2). A logging and railway company organized for the purpose of getting out timber owned by the stockholders has no other status than that of a private carrier, where it does not carry on a general freight business but occasionally transports articles for others at less than the cost of service.

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered May 2, 1921, affirming on certiorari an order of the public service commission declaring the relator to be a common carrier, etc., after a hearing before the court. Reversed.

Miller, Wilkinson & Miller, for relator.

The Attorney General, Raymond W. Clifford, Assistant (*Benjamin M. Lavine, Hastings & Stedman,* and *Donald G. Graham,* of counsel), for respondents.

[1]Reported in 201 Pac. 765; 203 Pac. 3.

Hovey, J.—This is an appeal from a judgment of the superior court of Thurston county affirming an order of the public service commission declaring the relator, Silver Lake Railway & Lumber Company, a common carrier and directing it to "operate its line of railway by transporting freight upon such schedules and upon such days as may be approved by the commission."

There is little conflict in the testimony and the facts are substantially as follows: The relator was incorporated under the laws of this state in the year 1903 as a railway company. Its charter contains the broad powers of a common carrier railway company. The corporation was formed, and the railway built, for the purpose of conveying a large amount of logs owned by the incorporators from the woods to the Cowlitz river, where the logs are dumped. This terminal point is about one mile from Castle Rock, and the railway as now constructed runs about six or seven miles further to Silver lake, which is in the midst of the timbered area owned by the incorporators of the railroad. The road was built purely as a logging railroad. It has a maximum grade in excess of four per cent and includes curves as great as twenty-nine degrees. Its equipment consists solely of logging trucks and one forty ton locomotive for the hauling of the same. It has no stations, has never published any tariffs, and has never sought business from others, nor held itself out as desiring the same. The country is sparsely settled, and while there is a wagon road following the general line of the railway, it is at times difficult of passage, and the railway company has carried a small amount of merchandise for other persons for which service it has at times made a charge, and at other times has rendered the service without charge. The charge made has never been under any fixed schedule, and has never been compen-

satory nor sufficient in amount to have justified the rendition of the service if that were the sole purpose of the railway. The operation of the railway has been entirely dependent upon the requirements of the railway company, and when the market for its logs was inactive it has not been operated. At one time the railway was not operated for a period of eighteen months, and it had not been operated for some weeks at the time the hearing was had.

It was found by the commission that the relator operated as a common carrier for a number of years after its incorporation and held itself out to the public as a common carrier. In our opinion, this finding is not justified by the testimony in this case, and the character of its operation does not seem to have differed during that period from that of later years.

In the year 1908, the relator brought an action seeking to condemn certain land which it required for its right of way, and in its petition alleged facts showing it to be a common carrier and as such entitled to the right of eminent domain. This action was never prosecuted to judgment, but the relator paid to the owners of the land the full price which they demanded for the same and secured their title in that manner.

The service heretofore rendered by the relator to other persons consisted chiefly of transportation of merchandise needed by a store operated near Silver lake, the customers of which were principally the employees of the railroad. For a short time it transported shingles for one of its stockholders, and at other times has carried isolated shipments of machinery, and in one month transported a large amount of gravel for the county commissioners for the purpose of repairing a highway. It has never transported logs for other persons.

The respondent Tenino Lumber Company has acquired options on some thirty million feet of timber and desires to have the relator compelled to carry out its logs.

At the outset the question is raised as to the power of the commission to declare a corporation a common carrier if that fact is disputed, and we are asked to pass upon the effect of such an order.

In most of the cases heretofore decided by this court the corporations involved have been confessedly public service corporations, and we have held that the orders of the commission relative to them are presumed to be within the bounds of reasonableness, and unless the contrary clearly appears, the same will stand. *State ex rel. Great Northern R. Co. v. Railroad Commission,* 60 Wash. 218, 110 Pac. 1075.

In our opinion, the question of the character of the corporation is one of fact and must be determined by the courts upon the evidence presented in the record. In the case of *Cushing v. White,* 101 Wash. 172, 172 Pac. 229, L. R. A. 1918 F 463, the question of the character of the corporation was determined by the court upon the evidence, and the effect to be given to the finding of the commission was not discussed. In *Associated Pipe Line Co. v. Railroad Commission of California,* 176 Cal. 518, 169 Pac. 62, L. R. A. 1918 C 849, the supreme court of California, in answering the contention that the declaration of the legislature of the character of a carrier would make it a common carrier irrespective of the facts, says:

"Indeed, such legislation, if attempted, would have been futile, since under the Fourteenth Amendment of the Federal constitution no state shall deprive any person of property without due process of law, and to take or devote private property to public use without compensation is such deprivation."

In *Producers' Transportation Co. v. Railroad Commission of California,* 251 U. S. 228, 40 Sup. Ct. Rep. 132, the supreme court of the United States said:

"It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."

A long line of cases are cited in support of this statement.

We come now to the question of the effect to be given to the declarations of the charter. Respondents cite § 211 of Wyman on Public Service Corporations, in which general language is used to the effect that a corporation is bound by the recitals in its charter. We have examined all the cases cited in the note to this section and none of them meet the present situation. Where a corporation enters upon a line of conduct prescribed by its charter it is held to full performance, but there are doubtless many corporations operating under charters containing an enumeration of powers which they have never sought to exercise. In our opinion, while these declarations are the justification for the acts that the corporation afterwards does and are binding upon the corporation for any line of action which it undertakes in accordance therewith, they are not in themselves the sole criterion by which the position of the corporation may be judged. What really fixes the status of the corporation is what it does, rather than what it says. "The answer to that ques-

tion does not depend upon whether its charter declares it to be a common carrier, nor upon whether the state of incorporation considers it such; but upon what it does." *United States v. Brooklyn Eastern District Terminal,* 249 U. S. 296, 39 Sup. Ct. Rep. 283, and cases cited. See, also, *Bridal Veil Lumbering Company v. Johnson,* 30 Ore. 205, 46 Pac. 790, 60 Am. St. 818, 34 L. R. A. 368; *Apex Transportation Co. v. Garbade,* 32 Ore. 582, 52 Pac. 573, 62 L. R. A. 513.

This court in *State ex rel. Harris v. Superior Court,* 42 Wash. 660, 85 Pac. 666, 7 Ann. Cas. 748, 5 L. R. A. (N. S.) 672, has recognized this principle.

"The courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as set forth in the articles of association, but evidence *aliunde,* showing the actual business proposed to be conducted, may be considered."

The fact that the relator brought an action seeking to condemn land for a right of way and the statements made in its petition therefor are like the statements in its articles of incorporation, evidence to be considered in considering its status, but are not, in our opinion, sufficient in themselves to establish a status which was in truth contrary to the facts.

The facts as shown in the record, in our opinion, conclusively establish that this corporation never advanced beyond the status of a private carrier. In *Cushing v. White, supra,* Judge Webster has set out the text of a great many authorities upon this subject and it seems hardly necessary to restate them here, and we will confine ourselves to the discussion of some of the authorities which we consider pertinent to this particular case. The undisputed evidence is to the effect that the relator was organized for the purpose of getting out timber owned by the persons organizing it and

that is the only business which it has ever followed as a business. Its transportation of articles for others where it made no charge would, of course, not change the status, and the fact that it did make charges in other instances which were in every instance less than the cost of the service rendered might be considered as bringing these acts within the gratuitous class, and as defined in 1 Moore on Carriers, p. 2, would constitute the railroad a private carrier so far as these acts are concerned.

The finding of the commission is that the logs transported by the railroad for itself, if charged for at customary rates, will equal in value $45,000 per annum, while the total sums realized from the charges made other persons did not average more than about $175 per year, and while the size of the business is not in itself sufficient to absolve the carrier of its position of common carrier, yet the fact that the business has been so conducted for so many years along this line is persuasive evidence that the relator neither intended to be, nor held itself out to be, a common carrier. The evidence is clear that the road is not now equipped for the carrying on of a general freight business. Its logging trucks when loaded aggregate about eighty thousand pounds in weight, while the loaded standard railway car is about double this weight. Its track is laid with rails which in no instance are more than forty pounds. Its grades and curves are excessive for those of ordinary railway business. When it operates, its entire equipment is now utilized in its own business, and to require it to undertake the transportation which is tendered in this case would require clear evidence of its legal obligation so to do, and, in our opinion, this is not supplied by the record in this case.

The judgment of the superior court of Thurston

county is reversed and the order of the public service commission heretofore made set aside.

Relator will recover costs.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

ON REHEARING.

[Department Two. December 30, 1921.]

PER CURIAM.—A petition for rehearing has been filed in this cause.

It is said in the opinion that the average freight receipts received from outside sources by the relator were about $175 per annum, and the petition for rehearing refers to the portion of the testimony where the president of the relator stated that that was the income for the year 1920 as being the only testimony on this point. Preceding this testimony is that of the same witness concerning total receipts for the year 1919 of considerable less than this sum, and on page sixty-five of the statement of facts the witness was asked whether they had hauled any freight previous to that time, and he answered that they had for some five or six years, "about the same amount of freight each year I presume." We think it cannot be questioned that the amount collected for freight from outside persons is inconsequential in the total, and the exact sums collected do not become especially material.

The petition is practically a restatement of the contentions made upon the former hearing, and we see no occasion to depart from the decision heretofore rendered. The petition is therefore denied.

[No. 16637. Department Two. November 5, 1921.]

GRACE MURPHY, *Appellant*, v. DAVE SCHWARK *et al.*, *Respondents*.[1]

BAILMENT (3)—LOSS OF GOODS—LIABILITY OF BAILEE. One accepting the control of premises in which household goods and other personal property is temporarily stored becomes a gratuitous bailee of the contents of the house, and as such chargeable with the use of reasonable care.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered May 4, 1921, upon granting a nonsuit, dismissing an action for conversion. Reversed.

C. A. Studebaker, for appellant.

HOVEY, J.—This is an appeal from a judgment granting a nonsuit in an action brought by the plaintiff to recover the value of certain personal property belonging to herself and the other members of her family.

The evidence introduced by the plaintiff was to the effect that a dwelling house had been occupied by the Murphy family for a considerable period and that, for some time prior to the act complained of, possession of the premises was in one Davis under sublease. The premises were purchased by the defendants and the former owner notified the Murphys to surrender possession. The removal of the property belonging to the Murphys was delayed a short time because of there being a case of smallpox on the premises, but the subtenant, Davis, moved out about September 13, locked up the house and, at the request of the defendants, deposited the key with a neighbor. When the Murphys

[1]Reported in 201 Pac. 757.

came to remove their goods about one week later they found the house unlocked and considerable of their goods gone, and were informed by the defendant Dave Schwark that he had unlocked the house and that he was not running a warehouse and was not responsible for the loss of the goods. The testimony on behalf of the plaintiff was to the effect that all of the missing goods were in the house at the time Davis moved out and surrendered the key as instructed by the defendant.

We believe the lower court was in error. In accepting control of the premises respondents became gratuitous bailees of the contents of the house and as such they were required to use reasonable care. 6 Corpus Juris, 1102-1104; *Smith v. Nashua & Lowell R. R.*, 27 N. H. 86, 59 Am. Dec. 364.

In the case of *Pregent v. Mills*, 51 Wash. 187, 98 Pac. 328, this court sustained recovery against a saloon keeper who had accepted a deposit of a sack of money belonging to a customer, without any proof of theft on the part of the bailee, and held that the burden was on him to explain the loss of the goods. To the same effect is *Colburn v. Washington State Art Ass'n*, 80 Wash. 662, 141 Pac. 1153, L. R. A. 1915 A 594.

The judgment of the trial court is reversed for further proceedings in accordance with this opinion.

Appellant will recover costs.

Parker, C. J., Main, Holcomb, and Mackintosh, JJ., concur.

[No. 16314. *En Banc.* November 8, 1921.]

In the Matter of the Estate of ARTHUR E. HOOPER.[1]

EXECUTORS AND ADMINISTRATORS (58, 59)—ALLOWANCE TO SURVIVING WIFE—MAINTENANCE OF "FAMILY" — STATUTES — CONSTRUCTION. Under Laws 1917, ch. 156, §§ 103, 104, providing for a homestead to a surviving spouse not exceeding in value $3,000 out of either separate or community property, and that in case a homestead had been selected, not exceeding $2,000 in value, the court shall award the surviving spouse other property so that the total value of homestead and other property shall not exceed $3,000, which shall be free from further administration, a widow to whom had been devised the equity in their home worth $1,370.63, and household furniture worth $300, was entitled to an award of a money judgment against the estate sufficient to bring her allowance to $3,000, notwithstanding she was made a residuary legatee to a one-third interest in property of the value of $6,468.75.

SAME (58, 59). Under Laws 1917, ch. 156, § 106, providing for a further reasonable allowance of cash out of an estate as may be necessary for the maintenance of the family during the settlement of the estate, a surviving wife is entitled to such allowance, though there are no minor children or other dependents on her.

SAME (59). A widow constitutes a "family" upon the death of her husband, though she is without children or may have children all of age.

SAME (62)—SUPPORT OF FAMILY—STATUTES—CONSTRUCTION. Statutes providing for allowances to the survivor of a decedent are strongly favored in law, rest in sound public policy, and should be liberally construed.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered September 14, 1920, upon findings in favor of the petitioner, granting an allowance to a surviving wife pending administration of an estate, after a hearing to the court. Affirmed.

Luby, Pearson & Dillard and *Stephens & Jack*, for appellants.

E. C. Matthias and *Graves, Kizer & Graves*, for respondent.

[1]Reported in 201 Pac. 740.

HOLCOMB, J.—The last will and testament of the decedent, in the form of a nonintervention will, was duly admitted to probate. By it, after providing for the payment of debts, expenses of last sickness and funeral expenses, he bequeathed to two of his relatives bequests amounting to $1,000. He bequeathed to his surviving spouse, Adeline R. Hooper, his equity in his dwelling house and home, together with the household goods and furniture owned by him or in which he had an interest at the time of his death. He devised certain other real estate to his daughter for life, with the remainder to his two sons; the residue of the estate he devised and bequeathed to his wife and two sons, Henry Arthur, and Robert Norman Hooper, share and share alike, as tenants in common, in fee simple.

The home devised to the wife had been purchased under a contract of purchase, the unpaid purchase price being payable in monthly installments. The widow, being left without means or substance, was unable to make the monthly installment payments upon the residence, and she filed a petition in the lower court praying that the residence and household furniture, and such other property as she might be entitled to, be set apart to her, and that, in addition thereto, a money allowance should be made to her sufficient to maintain her according to her circumstances, during the settlement of the estate. The executors joined issue upon this petition and resisted the allowances. The trial court, after a hearing, made findings substantially as follows:

That the petitioner is the surviving spouse and that there are no minor children of petitioner and the deceased; that debts having priority, after due notice to creditors, have been paid, and the estate is solvent; that petitioner was residing with deceased and was de-

pendent upon him; that the property of the estate is separate property; that deceased left a will by which he gave to the widow his equity in the dwelling house and home, together with the household goods and furniture; that the will specifically disposed of certain property; that the will contained a residuary clause as follows:

"I give, devise and bequeath all of the rest, residue and remainder of my estate of every kind and character, whether real, personal or mixed, wheresoever the same may be situated, and of whatever the same may consist, not otherwise disposed of by this my last will and testament, to my wife Adeline R. Hooper and to my sons Henry Arthur Hooper and Robert Norman Hooper share and share alike as tenants in common, in fee simple."

That the home devised to the widow, or the equity therein, was worth $1,370.63, and the household furniture bequeathed to her was worth $300; that the widow was without means; that no homestead had been selected prior to decedent's death; that the property not specifically devised and which passed under the residuary clause of the will was of the value of $6,468.75, exclusive of interest. The court therefore concluded that petitioner was entitled to have the equity in the dwelling house set aside to her, and the furniture, and $1,329.37 out of other property not specifically bequeathed or devised, and that the executors should sell and dispose of so much as might be necessary to enable them to pay the above sum to the petitioner.

A decree was thereupon entered awarding the widow the home given her by the will, the household furniture, and $1,329.37, as a money judgment against the estate, and authorized the executors to sell sufficient of the estate to pay this money judgment. No statement of facts is brought up.

Appellants did not resist the award of the home and household furniture, but insist that the court erred in concluding that respondent was entitled to any property in addition to the dwelling house and furniture bestowed on her by the will. It is contended that the whole proceedings are governed by §§ 103 and 104 of the probate code, ch. 156, Laws of 1917, page 642 *et seq.* Section 103, p. 670, provides for the setting apart of a homestead not exceeding in value $3,000, when one has not been claimed in the manner provided by law by the decedent, to the surviving spouse, if any, and out of either separate or community property. Section 104, p. 671, provides, in the event a homestead has been selected in the manner provided by law and the value thereof would not exceed $2,000 exclusive of incumbrances, in addition thereto, the court, upon being satisfied that the funeral expenses, expenses of last sickness and of administration have been paid or provided for, shall set off and award to the surviving spouse other property, either separate or community, so that the total value of the homestead and other property awarded, exclusive of liens, shall not exceed $3,000, and that when such property shall be so awarded it shall not be subject to further administration. The proviso to § 104 reads as follows:

"Provided, That the awards in this and the next preceding section provided for, shall not be taken from separate property of the deceased, which is otherwise disposed of by will, where there is no minor child living as the issue of the surviving spouse and the deceased."

Appellants therefore argue that this proviso precludes the setting aside of any property out of the residuary estate involved herein, for the reason that the residuum is "otherwise disposed of" and that there is

no minor child living as the issue of the surviving spouse and the deceased. They urge that the legislature intended to distinguish between an allowance for a widow with children and a widow without children. If there were surviving children this allowance could be taken from any property; if there were no surviving children, this allowance could not be taken from any but community property.

Counsel for the parties, respectively, use much space in discussing the meaning and intent of the words "otherwise disposed of" in the proviso to § 104. We think the proviso and the exact meaning of those words are immaterial as to this matter.

Section 106, p. 672, of the probate code is as follows:

"In addition to the awards herein provided for, the court may make such further reasonable allowance of cash out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate, and any such allowance shall be paid by the executor or administrator in preference to all other charges, except funeral charges, expenses of last sickness and expenses of administration."

Appellants contend that respondent based her petition specifically upon §§ 103 and 104 of the probate code. We observe that she did so only with respect to the homestead property and the household goods, and her petition further prayed "for an allowance for her maintenance pending administration." That was sufficient to give the court jurisdiction and authority to make a further allowance under § 106.

The proviso to § 104 only restricts the awards provided for in it and the next preceding section, § 103, so that they should not be taken from the separate property of the deceased which is otherwise disposed of by will where there is no minor child living, etc.

Section 106 contains no such restriction, and its only limitations are that a reasonable allowance be made, and that an allowance is necessary to the maintenance of the family according to their circumstances, during the settlement of the estate, and that only funeral expenses, expenses of last sickness and of administration shall be preferred charges to that allowance.

It may be contended that § 106, providing for further allowance for the maintenance of the "family", does not warrant an allowance for the maintenance of the surviving wife where there are no minor children or other persons dependent upon the surviving wife. A widow constitutes a family upon the death of her husband though her children were all of age. *Aultman, Miller & Co. v. Price,* 68 Kan. 640, 75 Pac. 1019, and a widow without children constitutes a family. *Moore v. Parker,* 13 S. C. 486.

Statutes providing for allowances to the survivor of a decedent rest in a sound public policy and should be liberally construed for the purpose of effecting the object intended. *In re Heilbron's Estate,* 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; *In re Lavenberg's Estate,* 104 Wash. 515, 177 Pac. 328. They are strongly favored in law. *In re Whitney's Estate,* 171 Cal. 750, 154 Pac. 855.

We are strongly of the opinion that the legislature did not intend to restrict the meaning of the word "family" in § 106 to a collection of persons under one domestic roof, especially since in §§ 103 and 104 the provisions were for the benefit of the surviving spouse regardless of whether there were any minor children or any other persons constituting the family, except as to the proviso to § 104.

In § 106, if we construe the word "family" to be the surviving spouse, as we think it should be, in order to

give a liberal interpretation, the court is clothed with ample power to make the award made herein.

All the findings necessary to support the award were made by the court. It may often be, as here, that no property save separate property can be found out of which to make such an allowance to the surviving spouse. That is of no consequence, however, for as a rule the estate of the decedent in this state consists mostly of community property of which the share of the surviving spouse may generally be sufficient for the maintenance of the surviving spouse during the pendency of the administration. If there be no community estate, however, the surviving spouse, especially when it is the wife, is often in the most necessitous circumstances, and this it is the beneficent purpose of this statute to relieve.

We therefore conclude that the judgment of the lower court is correct, and it is affirmed.

PARKER, C. J., MACKINTOSH, TOLMAN, MAIN, MITCHELL, HOVEY, and BRIDGES, JJ., concur.

[No. 16791. Department One. November 12, 1921.]

PAUL NISSEN *et al.*, *Respondents*, v. CHAS. H. LILLY COMPANY, *Appellant*.[1]

APPEAL (288)—RECORD—STATEMENT OF FACTS—EXTENSION OF TIME. Where a statement of facts is not served and filed with the clerk of the proper court within the ninety-day period fixed by statute, no excuse will suffice to extend the time for such filing and service beyond the statutory period.

SAME (287)—TIME FOR FILING—OBJECTIONS TO FAILURE TO FILE—ESTOPPEL. The duty of preparing, serving and filing a proposed statement of facts resting solely on appellant without any duty incumbent on respondent, the latter would not be estopped to object at a later period that the statement was not filed in time, by reason of the fact that he had accepted service by appellant and had appeared without objection and proposed amendments to the statement at the time of its settlement before the court.

Motion to strike statement of facts, filed in the supreme court September 23, 1921. Remanded for hearing on issue.

Wright, Kelleher, Allen & Hilen and *Peters & Powell*, for appellant.

J. L. Corrigan, for respondents.

TOLMAN, J.—On April 8, 1921, the Honorable Guy C. Alston, judge of the superior court for Snohomish county, then presiding in the superior court for Skagit county for the purpose of trying this cause, entered a judgment herein, upon the verdict of a jury, in favor of respondents and against the appellant. Immediately upon the entry of the judgment, one of appellant's counsel directed the official court reporter to prepare a proposed statement of facts, file it with the clerk of the superior court for Skagit county, where the cause was pending, and thereafter to withdraw such

[1]Reported in 201 Pac. 743.

statement from the office of the clerk and forward it, with the necessary copy, to appellant's counsel in Seattle, for service upon respondents' counsel, and that it might be taken to Everett at the convenience of the parties interested for settlement and certification by the judge who tried the cause. In due course the original statement of facts, with a copy, was forwarded as directed to Seattle, the original bearing a form for acceptance of service which recited that it had been duly filed in the office of the clerk of the superior court for Skagit county. On May 18, 1921, service was made at the office of respondents' counsel, and in his absence his clerk, without investigation or knowledge of the facts, and in accordance with the usual and accepted custom, signed the acknowledgment of service, which contained the recital that the original statement had been duly filed. Thereafter on May 25, respondents' counsel proposed certain amendments, and on July 20, by agreement of counsel, they appeared before the trial judge at Everett and the statement of facts was then and there settled and certified by the judge, all parties assuming that the original had been duly and timely filed. On August 17, 1921, and not until then, the clerk's file marks were placed upon the statement.

Affidavits are presented in this court pro and con, attempting to prove and disprove that the proposed statement of facts was lodged in the office of the clerk at the time it was completed by the court reporter, and before it was sent to Seattle for service, it being contended that if, in fact, it was so lodged with the clerk, the omission of the official file marks would be immaterial, which may be admitted.

It is further contended, (a) that if this court should hold that the statement was not in fact filed in time, the affidavits referred to show such excusable neglect

as would justify a denial of respondents' motion to strike the statement of facts, upon which the case now comes before us; (b) that respondents, having appeared at the time of the settlement and having made no objection thereto, thereby waived any objection to the failure to file in time, if there was such failure, and are now estopped to raise such objections; (c) that respondents, by reciting in the acceptance of service signed in their behalf that the same had been filed, are now estopped by such recital; and (d) that respondents, by proposing amendments and urging them at the time of the settlement of the statement, are thereby estopped to deny that the statement had theretofore been duly filed.

As to the contention that, if the statement was not filed in time, the affidavits show a sufficient excuse, it is sufficient to say that it is now settled in this court that where a statement of facts is not served and filed within the ninety-day period fixed by statute, no excuse will suffice to extend the time for such filing and service beyond the ninety-day period. In the case of *Universal Motor Co. v. McGeorge,* 104 Wash. 344, 176 Pac. 331, the record discloses what was considered good and sufficient excuse, but the majority of the court, sitting *En Banc,* after due consideration, were of the opinion that the service and filing of the proposed statement within the ninety-day period was mandatory, and that the court had already laid down the rule in *American Fuel Co. v. Benton,* 98 Wash. 26, 167 Pac. 346, that neither by the original statute nor by the amendatory act of 1915 (Laws of 1915, § 8, p. 303; Rem. Code, § 1730-8), was any authority given to this court to extend the time for serving and filing a proposed statement of facts beyond the ninety-day period. Nor has the court at any time since departed from this

position, and the question is no longer an open one. Hence we may not now consider whether the affidavits show excusable neglect.

The other contentions of appellant all raise the question of estoppel, and in support thereof the following authorities are cited: *Boyer v. Boyer,* 4 Wash. 80, 29 Pac. 981; *McGlauflin v. Merriam,* 7 Wash. 111, 34 Pac. 561; *Turner v. Bailey,* 12 Wash. 634, 42 Pac. 115; *Johnston v. Gerry,* 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

We have carefully examined these cases, the first two of which are based upon facts which arose before the enactment of our present statute, but can find in none of them anything which meets the present question.

The duty of preparing, serving and filing a proposed statement of facts rests solely with the appellant, and the respondent not only has no duty in that respect, but it is wholly optional with him whether he shall propose amendments or appear at the time of the settlement and certification. It can hardly be said that it is in any manner encumbent upon the respondent to warn his adversary of errors of omission or commission, or concern himself with the steps which are being taken, beyond what is necessary to protect his own rights. One of these rights is to propose amendments, and when the respondent does so, he acts wholly for himself and should not be held thereby to have waived the performance of any clear statutory duty resting wholly upon opposing counsel. The appearance in court at the time of the settlement and certification in this case was after the expiration of the ninety-day period, and must have been not for the purpose of assisting appellant in perfecting the appeal, but to secure the incorporation of respondents' own amendments and protect their rights in the event that the

appeal should be finally perfected. Nor is it shown that, at the time of the acceptance of service, the proposing of amendments, the appearance for settlement and certification, or at any other time until long after the expiration of the ninety-day period, respondents had any reason to suppose that the proposed statement had not been filed before it was served upon them. The acceptance of service with its recitals was prepared by appellant, and the signature of acceptance of service was made as an accommodation to appellant, in accordance with the established custom, at appellant's request, solely to save it the necessity of making other proof of service. It is apparent that respondents did not, intentionally or otherwise, mislead their opponent or fail to perform any duty owing by them to it; and simply because they did not sooner discover and in some manner advise appellant of the facts relating to the alleged omission to file, is no ground for invoking the doctrine of estoppel against them.

If our conclusions so far be correct, it follows that, if the proposed statement of facts was not actually lodged with the clerk within the ninety-day period, then respondents' motion to strike must be granted; but the facts relating to such lodgment cannot be determined with any assurance or certainty from the affidavits now before us, which contain only the *ex parte* statements of witnesses not cross-examined, are incomplete and unsatisfactory in some respects, and to some extent present incompetent matter which we cannot consider. The issue of fact, therefore, will be referred to the superior court of Skagit county, with directions to cause a hearing to be had on due notice, and at such hearing to accord each party the right to produce all its material witnesses to be examined

and cross-examined under the usual rules, and to make and report to this court findings upon that issue of fact, with the evidence.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16874. *En Banc.* November 14, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Chester R. Hovey, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*[1]

STATES (11)—OFFICERS (43)—SALARY—INCREASE DURING TERM—APPOINTEE FOR UNEXPIRED TERM—STATUTES. Under Const., art. IV, §§ 3, 13, fixing the terms of judges of the supreme court at six years from and after the second Monday in January next succeeding their election, and providing that the salaries of such judges "shall not be increased after their election, nor during the term for which they shall have been elected," on the death of an incumbent who was barred from receiving the statutory increase during the term for which he was elected, a judge appointed to fill his unexpired term comes within the same constitutional inhibition against increase "during the term" for which his predecessor had been elected.

Application filed in the supreme court October 19, 1921, for a writ of mandamus to compel the state auditor to issue a salary warrant to relator. Denied.

Chadwick, McMicken, Ramsey & Rupp, for relator.

The Attorney General and *Nat U. Brown*, for respondent.

TOLMAN, J.—Relator, by an original proceeding in this court, has made application for a writ of mandamus to be directed to the state auditor. The facts upon which he bases his application and the relief sought are set forth by him in substance as follows:

[1]Reported in 201 Pac. 770.

The late Mr. Justice Mount, having been theretofore duly elected, did, on the second Monday of January, 1919, qualify as a judge of the supreme court of the state of Washington for the full term of six years then beginning, and ending on the second Monday of January, 1925, and immediately entered upon and continually thereafter performed the duties of that office until the third day of September, 1921, when he died. On the 7th day of September, 1921, the Governor duly appointed relator to fill the vacancy caused by the death of Judge Mount, and the relator forthwith qualified, entered upon, and has since continuously discharged, the duties thus devolving upon him.

Relator alleges that, by virtue of the act of March 4, 1919 (ch. 77, Laws of 1919, p. 154), he is entitled to receive a salary at the rate of seven thousand dollars per annum, but that the state auditor has refused, and will continue to refuse, to issue to relator any salary warrant based upon an annual salary greater than six thousand dollars, and the prayer is: "That a peremptory writ of mandamus issue out of this court requiring, commanding and requesting respondent to draw and deliver to relator a warrant in the sum of $466.67, to cover his salary as judge of the supreme court from and including the 7th day of September, 1921, to and including the 30th day of September, 1921."

Respondent's demurrer admits the facts, and the only question presented is, in simple words, is relator entitled to the increased salary provided by the act of 1919, or is he limited to the amount of salary provided by the law at the time Judge Mount was elected and entered upon his last term?

This question has never been squarely presented to or decided by this court, and being a debatable one, the parties involved have sought by this proceeding,

brought in good faith and in a friendly spirit, to have all uncertainty removed.

Counsel for relator has in his brief given an interesting and exhaustive history of the inception and growth of the idea which is embodied in our constitution upon this subject, and it should not be assumed, because we do not recite that history here, that we have not given full consideration to it or weighed the argument that the evils sought to be prevented will not follow directly upon a decision in favor of relator.

A like question has been presented in other states, and the decisions are by no means harmonious. In many, if not most cases, the decision is made to rest upon the peculiar wording of the constitutional provision being considered, though the purpose and intent of all seem to be virtually the same, notwithstanding a difference in the language employed. Tennessee has a constitutional provision which reads:

"The judges of the Supreme Court and inferior courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected."

The supreme court of that state had occasion to pass upon the question now before us, and in *Gaines v. Horrigan,* 72 Tenn. 608, it was said:

". . . . the language is, that the compensation shall not be increased or diminished during the time for which they are elected. This obviously means during the time and not the term for which the judge is elected."

And accordingly it was there held that the judge appointed to fill out an unexpired term of a deceased judge was entitled to the compensation fixed by law at the time he assumed the duties of the office.

In *Board of Chosen Freeholders v. Lee,* decided by the supreme court of New Jersey and reported in 76 N. J. L. 327, 70 Atl. 925, the constitutional language under consideration was:

"The clerks and surrogates of counties shall be elected by the people of their respective counties, at the annual election for members of the general assembly, and shall hold their offices for five years."

And the court held that, under this constitutional provision, the term of office might be terminated before the expiration of the statutory period for which the incumbent was elected, by impeachment, resignation, or death of the officer; that the happening of any of these contingencies is an implied limitation upon the right of the elected officer to continue in office for the period for which he would otherwise hold, and that, when such contingency arises, the officer's term expires, there is a vacancy, and upon the appointment or election to fill the vacant office, the term of another officer begins. A like holding was made by the supreme court of Oklahoma in *Carter v. State ex rel. Taylor,* 77 Okl. 31, 186 Pac. 464.

In *State ex rel. Bashford v. Frear,* 138 Wis. 536, 120 N. W. 216, the supreme court of Wisconsin passed upon the same question and reached the same result, though apparently largely influenced by the fact that the executive officers of the state had uninterruptedly for fifty years or more acted upon the assumption that the appointee to fill a vacancy was entitled to the salary fixed by law at the time of his appointment. In Montana, by a divided court, the same result was reached in *State ex rel. Jackson v. Porter,* 57 Mont. 343, 188 Pac. 375.

Upon the other hand, under the constitutional provision to the effect that the compensation of any county officer shall not be increased "after his election nor

during his term of office," the supreme court of California, in *Larew v. Newman,* 81 Cal. 588, 23 Pac. 227, says:

"When Egenhoff took the office, the salary fixed by statute, was $350 per annum. Afterwards, and before he had resigned, the general county government act (approved March 14, 1883) went into effect, by which the salary of said office was fixed at $650 per annum. This act enacted that its provisions for salaries 'shall not affect the present incumbents'; and also that a vacancy in an office should be filled by appointment by the supervisors, 'the appointee to hold office for the unexpired term.' Section 9, Art. 11, of the State Constitution, provides that 'the compensation of any county . . . . officer shall not be increased after his election, or during his term of office'. Section 1004 of the Political Code provides that 'any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties and obligations, of the officer whose vacancy he fills.' We think that under these constitutional and statutory provisions, plaintiff merely stood in the shoes of Egenhoff and gained no additional rights. The increased salary did not commence until after the expiration of the term for which Egenhoff had been elected, and that result could not be evaded either by Egenhoff resigning and procuring himself to be appointed, or by his resigning and allowing some other person to be appointed."

The same court applied the same rule in *Storke v. Goux,* 129 Cal. 526, 62 Pac. 68, and in *Harrison v. Colgan,* 148 Cal. 69, 82 Pac. 674, and in the latter case it is said:

"It is a settled rule regarding such restrictions that they forbid any increase during a term, regardless of the fact that different persons may successively hold for successive parts of the term, so that one who is elected or appointed after a part of such term has

expired cannot have an increase made after the term began, though prior to his election or appointment."

The supreme court of Kentucky, in *Bosworth v. Ellison,* 148 Ky. 708, 147 S. W. 400, under a constitutional provision almost identical with our own, said:

"The rule of uniformity in compensation for like service so clearly intended would be destroyed and the amount of compensation be controlled not by the fixed term of office, but by the varying dates, at which persons might be inducted into office. Ellison was appointed to fill out a part of Morgan's unexpired term. He had no term of office apart from the term of Morgan. He was merely occupying the place that Morgan under his election would have filled except for his resignation. A term of office when the period of the term is fixed by Constitution or statute means the period designated by the constitution or statute. There should be a certainty and a fixedness about the words 'his term of office'. They were not intended to depend on the mere accident of appointment or election to fill a vacancy for a month or a year. When a person is appointed or elected to fill a vacancy in a term, he merely fills out the term of his predecessor. He does not enter on a new term of office, as does a person who is elected or appointed and takes the office at the beginning of the term as fixed by law."

So, too, the supreme court of Illinois, in *Foreman v. People,* 209 Ill. 567, 71 N. E. 35, held that a constitutional provision forbidding a change in the compensation of judges during their continuance in office refers to the term and not to the individual, so that one elected after the passage of the act increasing the compensation, to fill an unexpired term of a judge elected before the passage of that act, was not entitled to receive the increased salary. To the same effect are: *Kearney v. Board of State Auditors,* 189 Mich. 666, 155 N. W. 510, and *Baker v. Kirk,* 33 Ind. 517. There are other cases cited by counsel, but as we consider

them persuasive only, we do not find it necessary to discuss them.

In the light of these authorities, let us turn to our own constitution. Section 13, art. IV, provides:

"The judges of the supreme court and the judges of the superior courts shall severally, at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected."

The term of office of judges of the supreme court is likewise fixed by the constitution, section 3, art. IV, provides:

"After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election."

The language used is so plain and direct that we see little occasion for construction. In section 13, of art. IV, the words "during their continuance in office" refer to the individuals who shall receive the salaries, and the words following, "which shall not be increased after their election nor during the term for which they shall have been elected", in the light of the specific fixing of a six-year term, must be held to refer to that term, whether filled in its entirety by the first incumbent or successively after his demise, resignation or impeachment by others appointed or elected to fill out his unexpired term. In other words, the constitution first carves out a definite and fixed six-year term, and then, in the later section, refers to that term as an entirety and forbids an increase of salary during its existence, without regard to the individual who may occupy it at any particular time.

Like the supreme court of Wisconsin, we think some weight must be given to the construction placed upon

the constitution by other departments of the state government, and it appears that the Attorney General as early as 1909 placed a like construction upon § 8, art. XI, which refers to the compensation of county officers in somewhat similar terms, and this construction has been followed since that time. Opinions of the Attorney General, 1909-10, page 8. Moreover, the construction which we now place upon these provisions of the constitution is in harmony with the spirit and purpose of the construction heretofore placed by us on other provisions of the constitution. *State ex rel. Davis v. Clausen,* 47 Wash. 372, 91 Pac. 1089; *State ex rel. Funke v. Board of Commissioners of Pierce County,* 48 Wash. 461, 93 Pac. 920; *State ex rel. Reynolds v. Howell,* 70 Wash. 467, 126 Pac. 954, 41 L. R. A. (N. S.) 1119; *State ex rel. Younger v. Clausen,* 111 Wash. 241, 190 Pac. 324; *State ex rel. Bagley v. Clausen,* 111 Wash. 254, 190 Pac. 329.

Had we the time and space we might analyze these cases and point out the reasoning therein applicable to the present question and the similarity of the principles involved, but deeming the language of the constitution plain and the authorities already cited abundant, we desist.

The writ will be denied.

PARKER, C. J., HOLCOMB, FULLERTON, MAIN, BRIDGES, and MITCHELL, JJ., concur.

[No. 16124. *En Banc.* November 14, 1921.]

JAFET LINDEBERG, *Respondent*, v. JAMES A. MURRAY, *Appellant*.[1]

EQUITY (6)—GROUNDS FOR RELIEF—MISTAKE OF FACTS—RESCISSION OF CONTRACT. The true test in cases involving mutual mistake of fact being whether the contract would have been entered into had there been no mistake, a contract is subject to rescission, where there is a clear *bona fide* mistake regarding material facts, without culpable negligence on the part of the person complaining.

CONTRACTS (116) — RESCISSION — MISTAKE OF FACT — EVIDENCE — SUFFICIENCY. Where, as part of the agreement for a bank's taking over the assets and liabilities of another bank in straitened circumstances, it was agreed by the president of the former bank to buy the stock of the principal shareholder of the embarrassed bank, but, owing to the discovery of a heavy defalcation of the latter's funds, the original agreement for the transfer was rescinded and a new arrangement made, the contract for sale of the principal shareholder's stock was such a part of the rescinded contract as to be likewise subject to rescission.

MACKINTOSH, HOLCOMB, and HOVEY, JJ., dissent.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 30, 1920, in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

Stephen V. Carey, for appellant.

Williamson, Freeman & Broenkow, for respondent.

TOLMAN, J.—Appellant, James A. Murray, has appealed from a decree entered by the trial court rescinding a contract whereby the respondent, Lindeberg, agreed to purchase, and appellant, Murray, agreed to sell, 1,519 shares of the capital stock of the Bankers Trust Company of Tacoma for the sum of $14,000. It is conceded that the case turns almost entirely upon questions of fact, and while there is com-

[1]Reported in 201 Pac. 759.

paratively little dispute regarding the facts, the parties are widely apart in the construction and emphasis which they lay upon the facts, and in the conclusions which they draw therefrom.

The history of the transactions out of which this action arises is long and complicated, and a full and complete statement of all the facts shown by the record would occupy far too much space; therefore, in our statement of the facts and discussion, we have limited ourselves to such facts as seem to be necessary for an understanding of the points raised and relied upon by the appellant. Other facts are called to our attention, but after a careful reading of the record, we do not regard them as controlling.

The Bankers Trust Company being in financial difficulties, the stockholders, in March, 1917, authorized the directors to convert the assets into cash and liquidate its affairs. At this time appellant was its principal stockholder, owning 1,519 shares out of a total of 3,000 shares of the capital stock of the trust company. Nothing was accomplished in the way of liquidation for some months, and in the fall of the year 1917, the bank examiner insisted upon the levying of a one hundred per cent assessment against the stockholders, or, as the only alternative, that the institution be closed. Being unwilling to submit to the assessment, the officers and stockholders determined to voluntarily liquidate under some plan which would be agreeable to the bank examiner. The Scandinavian-American Bank of Tacoma, seeking an opportunity to secure the business of the depositors of the Bankers Trust Company, entered into negotiations with appellant, James A. Murray, through his nephew and agent, James E. Murray, and with the officers of the trust company, looking towards the liquidation of the trust company through the Scandinavian-American Bank. Respondent, Linde-

berg, was an officer and stockholder of the Scandinavian-American Bank, and became interested through a desire to assist the bank, and also, perhaps, because of a possible opportunity to realize a profit upon the purchase of appellant's stock in the trust company. Mr. Lindeberg and appellant's agent, James E. Murray, were brought together about November 7, 1917, and after some negotiations they arrived at an understanding which James E. Murray submitted to his principal, the appellant, in a telegram reading as follows:

"Seattle, Wash., November 8th, 1917.
"Mr. James A. Murray,
"Montezuma Hotel,
"Nogales, Ariz.

"Have closed deal with Scandinavian-American Bank, turning over all assets for twenty-eight thousand dollars, to be distributed pro rata amongst the stockholders, Scandinavian paying all deposits and obligations and saving stockholders harmless, you to take out properties at prices as follows: Bank Building two hundred thousand, Regents twenty-five thousand, Manning note seventeen thousand, J Street property three thousand five hundred, total two hundred forty-five thousand five hundred. Stop. Your deposit and interest one hundred twenty thousand, your share of dividend fourteen thousand, therefore must provide additional to this approximately one hundred twelve thousand when property mentioned will be deeded to you clear of all incumbrances. Consider deal a good one and am anxious to close immediately fearing complications. "James E. Murray."

It being understood that, if appellant should approve the plan outlined in the telegram, the necessary formal papers would be executed. Appellant replied to this telegram, giving the plan his approval, and provided the funds necessary to carry it into effect. Thereafter Mr. Larson, representing the Scandinavian-American Bank, declined to carry out the arrangement

outlined in the telegram quoted. Mr. James E. Murray renewed negotiations with others, but on November 13, 1917, the parties again got together and made the agreement out of which this controversy immediately arises, which agreement is as follows:

"AGREEMENT

"This agreement, Made this 13th day of November, A. D. 1917, by and between James A. Murray, of Butte, Montana, as party of the first part, and Jafet Lindeberg, of San Francisco, California, as party of the second part,

"Witnesseth: That the said party of the first part hereby sells to the party of the second part fifteen hundred nineteen (1519) shares of the capital stock of the Bankers Trust Company of Tacoma, for the sum of fourteen thousand dollars ($14,000) it being understood that the said party of the second part shall, upon the execution of this agreement, deposit in the American Savings Bank & Trust Company of Seattle, the said sum of fourteen thousand dollars ($14,000), the same to be delivered to the said James A. Murray upon the surrender by James A. Murray of the fifteen hundred nineteen (1519) shares of the capital stock of the Bankers Trust Company of Tacoma, which stock is to be delivered on or before thirty (30) days from the execution of this instrument, it being understood and agreed, and the said party of the second part hereby binds himself to save the said James A. Murray harmless from any liability or assessment on said stock.

"James A. Murray,
"By James E. Murray, His Agent and Attorney-in-fact.
"Jafet Lindeberg."

It is undisputed that, at the time this contract was executed, the books of the Bankers Trust Company showed that its assets were ample to take care of all its liabilities. On the day following the execution of this agreement, Mr. Larson, as manager of the Scandinavian-American Bank, forwarded to the American

Savings Bank & Trust Company at Seattle a cashier's check for $14,000, payable to the order of appellant, with directions to deliver the check upon the surrender of the 1,519 shares of stock of the Bankers Trust Company properly endorsed. The receipt of this check was acknowledged under date of November 15, 1917. On the same day appellant was advised by the American Savings Bank & Trust Company, by telegram, that the check had been deposited and that the stock should be forwarded. On the evening of November 15, 1917, a shortage was found in the assets of the Bankers Trust Company amounting to the sum of $17,175.86, due to the defalcation of a bookkeeper, who, by a system of false entries, had succeeded in passing through the Bankers Trust Company a number of checks drawn by himself which he had caused to be charged to the accounts of various depositors, so that the trust company in fact owed its depositors $17,175.86 in excess of the amount shown by its books to be due depositors. Before this shortage was discovered, James E. Murray, the agent of appellant, who had conducted the negotiations, had returned to his home in Butte, Montana, but before he left Tacoma the arrangements for turning the assets of the Bankers Trust Company over to the Scandinavian-American Bank had been completed contemporaneously with the execution of the agreement for the sale of the stock hereinbefore set forth, by the adoption of the proper resolutions by the directors of the Bankers Trust Company on November 13, 1917, which, among other things, provided that the Scandinavian-American Bank should save the trust company stockholders harmless from any stock liability. Respondent, Lindeberg, had also departed for his home in California, leaving the carrying out of the details to Mr. Larson of the Scandinavian-American Bank.

Pursuant to the contract between the two banks, the Scandinavian-American Bank was to take actual possession of the Bankers Trust Company at the close of business on Saturday, November 17, 1917, so that the transfer, so far as the public was concerned, should be effected on Monday, November 19, at which time the depositors' accounts would be written into the books of the Scandinavian-American Bank. The discovery of the defalcation came as a complete surprise to everybody, and of course presented a situation which had not been theretofore contemplated by either party. The directors of the trust company feeling that the Scandinavian-American Bank would, on discovery of the defalcation, refuse to go further, and that in such event the bank examiner would immediately take possession, which all were anxious to prevent, concluded that something must be done immediately that same night if the bank was to open in the morning. Mr. Larson was informed of the defalcation, and he and a Mr. Heitman, who had been acting as a broker in the matter (each party now asserting that he was the agent of the other), immediately called up Mr. James E. Murray in Butte, by long distance telephone, and acquainted him with the situation. The parties are not in accord as to the nature of the conversation had with Mr. Murray over the telephone. Mr. Larson testified that he told Mr. Murray that Mr. Lindeberg would not purchase the stock under the conditions as they then appeared, and that the Scandinavian-American Bank would not proceed with the liquidation. James E. Murray in his testimony denies that anything was said in this telephone conversation about calling the deal off. Mr. Heitman testifies that he told Mr. Murray over the telephone that Mr. Larson, representing the respondent, was hesitating, and that Murray replied: "If he don't want to go through with it

we can liquidate the bank ourselves." All agree that James E. Murray, in the telephone conversation, gave them no satisfaction, and committed himself to nothing except that he was sorry to learn of the additional trouble.

Following this telephone conversation, the bank examiner was called in and met with the directors of the trust company early on the morning of November 16, at which meeting Mr. Larson was present and gave notice that the Scandinavian-American Bank would not carry out the agreement of the 13th, and also the bank examiner advised all present that he would not permit that agreement, which relieved the stockholders of their double liability, to be carried out, and they would have to perfect some other plan immediately or he would close the institution. Realizing the situation, the board of directors authorized the execution of a new agreement with the Scandinavian-American Bank, which met with the approval of the bank examiner, and is as follows:

"Tacoma, Washington, Nov. 16th, 1917.

"A special meeting of the board of directors of the Bankers Trust Company was held at the city of Tacoma on November 16th, 1917, at the hour of nine o'clock a. m., at which meeting all of the members of the said board were present and consented to the holding of said meeting and waived any and all notice thereof.

"It was reported that, upon checking up the books and accounts of the said bank, that a shortage of about $17,125, caused by the defalcation of the bookkeeper McDonald, had been found and that said McDonald had confessed thereto.

"In view of such shortage, the board after discussion recognized that the Scandinavian-American Bank of Tacoma, Washington, could not be expected to carry out its agreement heretofore made to save the

stockholders of this bank from an assessment upon their stock in case the assets were found insufficient to pay all of its liabilities, and after going over the matter with the bank examiner, Mr. Hanson, and his deputy, Mr. Moore, and with the officers of the said Scandinavian-American Bank, the following resolution was offered by Mr. Wright, and seconded by Mr. Danaher and unanimously adopted, to-wit:

"Whereas, a defalcation and embezzlement of about $17,125 of this institution's money has been made by McDonald, the bookkeeper, and

"Whereas, the Scandinavian-American Bank of Tacoma refuses to guarantee to hold the stockholders of this bank harmless from any liability as such, by reason of such defalcation; and

"Whereas, we believe it is for the best interests of all concerned that this bank be liquidated through the Scandinavian-American Bank of Tacoma, and that the stockholders of this bank agree to guarantee and hold harmless the said Scandinavian-American Bank from any loss in its liquidation thereof; and

"Whereas, the said Scandinavian-American Bank agrees to proceed to liquidate this bank in case we convert certain of our assets into cash in compliance with the terms and conditions of the proposed plan outlined in our minutes of November 13th, 1917;

"Now, therefore, be it resolved, that in consideration of the said Scandinavian-American Bank of Tacoma taking over our deposits and paying our depositors and assuming and agreeing to pay all of our contracts and engagements, that the liability of each and every one of the stockholders of the said Bankers Trust Company shall continue and be in full force and effect until sufficient assets have been converted into cash to meet the established liabilities; and

"Be it further resolved, that the Bankers Trust Company sell, assign, transfer and convey to James A. Murray the following described property for the prices set opposite each item, in conformity with his offer heretofore made and outlined in our minutes of November 13th, 1917, to-wit:

Bankers Trust Building, supplies and personalty	$200,000.00
Regent Theater Building	25,000.00
L. R. Manning note and securities	17,000.00
The "J" Street residence property	3,500.00
	$245,500.00

The purchase price of said property to be as follows, to-wit: Total selling price $245,500; the said James A. Murray to be allowed a credit for the full amount of his deposit in the Bankers Trust Company and all accrued interest thereon amounting in all to the sum of $120,000 to apply as a part payment on the purchase price of said property, the balance of said purchase price to be paid in cash by said James A. Murray, or his assigns upon the delivery of deeds and abstracts showing merchantable title, said deeds and abstracts to be delivered to and deposited with the American Savings Bank & Trust Company of Seattle, with directions to deliver the same to said James A. Murray or his assigns upon the payment of the balance of the purchase price herein specified, allowing a credit of $120,000 as above mentioned, and the balance of the said purchase price, to-wit: $125,500 to be paid in cash, and

"Be it further resolved that J. F. Murphy, as vice-president and M. M. Ogden, as secretary, of this corporation, be and they are hereby authorized, empowered and directed to procure the necessary abstracts, make, execute and deliver to the said James A. Murray, or to his assigns, the necessary deeds of conveyance and assignment, granting, conveying and assigning to the said James A. Murray, or his assigns, the said described property free and clear of all incumbrances, except as above mentioned, and receive the purchase price therefor, the same to be paid in the manner above specified.

"The above action was taken under authority vested in the board of directors by the stockholders at their meeting held on March 17, 1917.

"Mr. J. C. Heitman, representing Mr. James A. Murray, was present at this meeting and stated that

Mr. Murray's agreement to purchase the assets above mentioned would be carried out notwithstanding the new developments hereinabove mentioned.

"There being no further business the meeting adjourned.

"J. F. Murphy
"Geo. P. Wright
"M. A. Cole
"W. C. Wheeler
"C. F. Danaher
"Guy E. Kelly
"M. M. Ogden,
"Directors."

"Appointment of committees, Nov. 16, 1917.

"The chairman appointed a committee consisting of Guy E. Kelly and M. M. Ogden to consult with Mr. Edwards of the Northern Bank & Trust Company of Seattle, regarding the Phillips indebtedness, to consult with the prosecuting attorney, if thought advisable, and to report to the directors, suggesting the best course to be taken in the matter."

On the same day that this final agreement between the banks was entered into, Mr. Larson wrote a letter to the American Savings Bank & Trust Company of Seattle, referring to the escrow agreement for the purchase of appellant's stock by the respondent, which, in part, reads as follows:

"That since the execution and delivery of said agreement and the deposit with you in escrow of the $14,000, pursuant to the terms of the agreement, it has developed that a shortage in the cash assets of the Bankers Trust Company of $17,125 exists and did exist at the time of the making of the agreement herein referred to, by reason of the defalcation of one of the bookkeepers of the Bankers Trust Company by the name of McDonald, which fact was unknown to all parties to the agreement at the time of the making of the same. There may be other defalcations as yet undiscovered.

"Since the discovery of this defalcation just last night the board of directors of the Bankers Trust Company has been in session with the state bank examiner and his deputy, and resolutions have been passed modifying the terms of the agreement entered into whereby the Scandinavian-American Bank of this city was to take over the liabilities and assets of the Bankers Trust Company for the purpose of liquidating the same, at which meeting Mr. Heitman of this city, the local representative of Mr. James A. Murray, was present, representing Mr. Murray.

"In view of this changed condition, you and each of you are hereby notified not to deliver the cashier's check No. 24527, for $14,000, deposited under the terms of the agreement heretofore referred to, nor to endorse, negotiate or otherwise dispose of the same to James A. Murray or to any other person whomsoever until further notice from the undersigned, which will not be given until matters have been satisfactorily adjusted in view of the developments herein referred to.

"Yours very truly,

"O. S. Larson, Manager."

Nothing having been heard from Mr. James E. Murray following the long distance telephone conversation had on the night of November 15, Mr. Larson, on November 20, acting in behalf of the respondent, wrote Mr. Murray as follows:

"This is to advise you that last Thursday evening, the 15th day of November, it was discovered that the liabilities of the Bankers Trust Company on individual account had been understated to the amount of $17,166.68, and that there may be other discrepancies for which no adequate provision has been made, and that this condition was concealed from the said Jafet Lindeberg and that he had no knowledge of the same at the time of entering into the agreement above referred to. Upon the discovery of this shortage, we served the American Savings Bank & Trust Company at Seattle with legal notice, a copy of which we enclose, instructing them not to deliver, endorse, negotiate or in any

way dispose of the cashier's check for $14,000, which they are holding in pursuance of an agreement entered into between James A. Murray and Jafet Lindeberg, on November 13th. Friday morning, November 16th, the directors of the Bankers Trust Company, in pursuance of authority vested in them by a stockholders' meeting duly called and held, turned over to the Scandinavian American Bank all of the assets of the Bankers Trust Company for the purpose of paying the depositors of said bank by and with the approval of the Banking Department of the State of Washington, and in addition guaranteed and agreed to hold the Scandinavian American Bank of Tacoma harmless from any loss in case all of the assets of the said Bankers Trust Company should prove of less cash value than the established liabilities, contracts, debts and deposits of the said Bankers Trust Company.

"In view of the facts as enumerated above, said Jafet Lindeberg hereby refuses to accept from James A. Murray the said 1,519 shares of the capital stock of the Bankers Trust Company and denies that he is indebted to the said James A. Murray in any sum or sums whatsoever, and hereby demands the said James A. Murray to order the American Savings Bank & Trust Company at Seattle to return to the Scandinavian-American Bank of Tacoma the cashier's check for $14,000, now held by said American Savings Bank & Trust Company in pursuance of the escrow agreement between James A. Murray and Jafet Lindeberg, dated November 13th, 1917."

No response to this letter having been made by Mr. Murray, this action was brought, demanding a rescission and cancellation of the agreement to purchase appellant's stock; that the cashier's check be returned to the Scandinavian-American Bank, and that the stock of the Bankers Trust Company be returned to appellant. The trial court, after hearing the evidence, entered a judgment rescinding the contract and placing the parties in *status quo* as prayed for; from which judgment this appeal is prosecuted.

Appellant's principal contentions are that there was no mistake, in a legal sense, inducing the making of the contract sought to be rescinded; that the agreement for the sale of the stock and the agreement for the transfer of the bank's assets were interrelated and inseparable parts of one contract, which cannot be affirmed as to its benefits and rescinded as to its burdens.

We think it is elementary that, where there is a clear *bona fide* mistake regarding material facts, without culpable negligence on the part of the person complaining, the contract may be avoided and equity will decree a rescission. We take it that the true test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake. *Stahl v. Schwartz,* 67 Wash. 25, 120 Pac. 856; 10 R. C. L. 296-299. We are clear that there was such a mistake here. The agreement of November 13 for the purchase of the stock was undoubtedly entered into by both parties in the belief that the books of the trust company spoke the truth as to its assets and liabilities, and presumably the contract would never have been entered into had respondents known the true facts. The two agreements, the first between appellant and respondent whereby the former sold to the latter his stock in the trust company, and the second whereby the Scandinavian-American Bank took over and liquidated the affairs of the trust company, were, we think, separate contracts, each distinct from the other. The first agreement, for the sale of the stock, was related to the second only in the sense that the appellant, as the dominating stockholder in the Bankers Trust Company, had used that fact to hold up the plan for the liquidation of its assets and the payment of its obligations until he had disposed of his stock, and no doubt the purchase of the stock by respondent moved the ap-

pellant to consent to the agreement to liquidate. However, the effect of even this relationship was completely lost upon the discovery of the defalcation and the refusal of the Scandinavian-American Bank to proceed with the liquidation contract as first made, the giving of the notice to all concerned, and the substitution of the new agreement of November 16 under which the liquidation was finally effected, which effectually rescinded the former agreement.

Appellant's agent, James E. Murray, was promptly notified upon the discovery of the defalcation and whether or not we accept the testimony of Mr. Larson and Mr. Heitman to the effect that he was then informed that Lindeberg would not purchase the stock, or that he was hesitating, still, as a man familiar with business affairs, he must have known that knowledge of this defalcation and the changed conditions would produce its effect and that the Scandinavian-American Bank might, and probably would, refuse to undertake the liquidation of the trust company under the terms of the agreement theretofore made between them which placed the liability caused by the defalcation upon it. He had opportunity, brief, it is true, to wire directions to the directors of the trust company as to what should be done under the changed conditions, but whether he did so or not, and without regard to appellant's position as the holder of the majority of the stock of the trust company, its directors had full legal power and authority to manage and direct its affairs and must be held to have properly entered into the modified agreement, made after the defalcation was discovered, for the liquidation of the trust company. The second agreement, made by the directors of the trust company on November 16, cannot be said to be a part of the agreement for the sale of the stock which

was executed three days before, and we see no reason, in view of the power of the directors to make the later agreement which was entered into after knowledge of the shortage, why the former agreement between the individuals, who are parties to the cause, should now be held to be a part of an agreement which was not even contemplated until two or three days after the agreement between the individuals was made.

Other points are raised and discussed by the appellant which, in view of the length of this opinion, we do not consider it necessary to discuss. We are clear that the parties entered into the agreement under consideration through mutual mistake of fact, from which equity will relieve, and that the contract between the individuals, parties to this suit, and the subsequent contract between the banks by which the affairs of the Bankers Trust Company were liquidated, were not so related that the performance of the latter contract will prevent the rescission of the former.

The judgment appealed from will be affirmed.

PARKER, C. J., MAIN, MITCHELL, BRIDGES, and FULLERTON, JJ., concur.

MACKINTOSH, J. (dissenting)—I cannot agree with the majority opinion in this case, one reason being that the contract of Lindeberg of November 13 to purchase Murray's stock in the Bankers Trust Company, and Murray's contract with the Scandinavian-American Bank to purchase certain assets of the Bankers Trust Company were, as testified to by every witness in the case, inseparable parts of one general agreement, and that Murray cannot be held to his bargain to assume the burdens and at the same time be denied the benefits. Lindeberg himself testified that the agreement was made by him to assist the Scandinavian-American

Bank, in which he was a large stockholder, and that his agreement to purchase Murray's stock, and the purchase by the Scandinavian-American Bank of the Bankers Trust Company, which involved the purchase in turn by Murray of certain of the Bankers Trust Company's assets, were parts of one transaction. He testified: "I would not have cared to purchase the stock without getting the assets. The purchase of the stock and the delivering of the assets went together naturally." This court has already held, in conformity with the general rule, that a party cannot ratify one part of a contract which is beneficial to his interest, and disaffirm that part which does not result in his benefit; that the rescission must be total. *Seattle Nat. Bank v. Powles,* 33 Wash. 21, 73 Pac. 887.

On November 16, after the discovery of the McDonald shortage, Lindeberg and the Scandinavian-American Bank did not elect to rescind, but in the absence of Murray, or any one acting in his behalf, they agreed to changes in the contract between the Bankers Trust Company and the Scandinavian-American Bank which did not modify the agreement of Murray to take up the unliquid assets of the trust company, and by November 20, the Scandinavian-American Bank had proceeded with the acquisition of the Bankers Trust Company's assets, which included $125,000 in cash which Murray then had on deposit in that institution, and had obtained possession of the deposit at Seattle of Murray's additional sum of $112,000 to complete the purchase of the assets of the Bankers Trust Company, and all this money was received by Lindeberg's institution before Murray was notified of the changed arrangement of November 16. The sum total of the transaction is that Murray has paid out $245,500 in cash, and in exchange therefor has received unliquid

assets of the Bankers Trust Company, under a modified agreement of which Murray was not advised, and, according to the majority opinion, the other parties to the contract now have a right to refuse to carry out the agreement to buy Murray's stock for the sum of $14,000, which was a part of the consideration to pass to Murray in exchange for his agreement to take up the trust company's assets.

Furthermore, the mistake, if any there be, which the majority opinion holds is sufficient to justify a rescission is not such a mistake as would cause that result to follow. There is no question of rescission on the ground of fraud, as fraud is expressly disclaimed. The only mistake that is alleged is the lack of knowledge as to a fact which might have had some bearing on the making of the contract. Although Lindeberg might not have entered into the contract had he known of this shortage, Murray certainly would have made the contract had he known of the shortage. The common lack of knowledge is not a mutual mistake so far as the law is concerned. As was said in *Borden v. Richmond etc. R. Co.*, 113 N. C. 570, 18 S. E. 392, 37 Am. St. 632: "A unilateral error does not avoid a contract." And even though there may be exceptions to this rule, as was stated in *Bibber v. Carville*, 101 Me. 59, 63 Atl. 303, 115 Am. St. 303:

"While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby."

There being no fraud in the case, no mutual mistake, and no mistake which induced Murray, who has secured no unconscionable advantage by reason of the

contract, to make the contract, a court of equity will not rescind.

For the reasons stated, I dissent.

HOLCOMB and HOVEY, JJ., concur with MACKINTOSH, J.

[No. 16850. Department One. November 14, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Dora Fleischman, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Bruce Blake, Judge, Respondent.*[1]

MANDAMUS (4)—TO COURTS—JUDICIAL PROCEEDINGS—REMEDY BY APPEAL. Under the rule that a writ of mandamus issues to a lower court to compel it to exercise its judicial functions and powers, not to direct or control their exercise, the writ will be denied when it is sought as a mode of determining the constitutionality of a statute on which the lower court had rested its conclusion.

Application filed in the supreme court October 4, 1921, for a writ of mandamus to compel the superior court for Spokane county, Blake, J., to proceed with the trial of a cause. Denied.

Frank Yuse, Fred Duggan, and *McCarthy, Edge & Lantz,* for relator.

Wm. C. Meyer, for respondent.

FULLERTON, J.—The relator, Dora Fleischman, instituted an action in the superior court of Spokane county against her husband, Frank Fleischman, for a divorce. The husband being a nonresident, service of summons upon him was sought to be obtained by publication, and to that end the relator caused a summons in the usual form to be published for the required time in a newspaper authorized under the statute to publish legal notices. After the publication had been com-

[1]Reported in 201 Pac. 739.

pleted, proof of its publication was made by affidavit. The affidavit was regular in all respects, save that it did not state that the fee charged for the publication had been fully paid and that it showed on its face that the charge made for the publication was less than the minimum charge prescribed by chapter 99 of the Laws of 1920-1921, p. 293. On this proof the trial court refused to grant a motion for default or to proceed further with the cause, holding that a compliance with the statute in the respects mentioned was a necessary requisite to its jurisdiction to further proceed. With the status of the cause in this condition, the relator applied to this court for an original writ of mandamus, directed to the judge of the court, commanding him either to grant the default and proceed with the trial or show cause why he should not do so. An alternative writ was issued, to which the trial court has made return to the effect that he ruled to the effect complained of because of the mandate of the statute cited.

In this court, at the hearing on the return to the writ, the relator urged but one question, namely, the constitutionality of the statute on which the trial court rested its conclusion. But this question we do not feel called upon to determine in this form of proceeding. It would be to make the writ of mandamus perform the function of an appeal or a writ of review. This is not the purpose of such a writ when issued from this court. It issues from this court to a superior court to compel it to exercise its judicial functions and powers, not to direct or control their exercise. *In re Clerf,* 55 Wash. 465, 104 Pac. 622; *State ex rel. Woods v. Mackintosh,* 99 Wash. 553, 169 Pac. 990; *State ex rel. Luketa v. Jurey,* 108 Wash. 44, 182 Pac. 932; *State ex rel. Langly v. Superior Court,* 74 Wash. 556, 134 Pac. 173; *State ex rel. Godfrey v. Superior Court,* 111 Wash. 101, 189 Pac. 256.

In the instant case the court did not refuse to exercise its judgment. On the contrary, it held, when the affidavit was presented to it, that it was insufficient to warrant the relief sought by the relator. This was clearly within its prerogative. It may have committed error in so doing, but if it did so, the error is not reviewable in any form of proceeding in advance of the final judgment in the cause, much less is it reviewable by an original writ of mandamus issued out of this court.

There being no justiciable question before us, the alternative writ heretofore issued will be quashed, and a peremptory writ refused.

PARKER, C. J., MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

[No. 16743. Department Two. November 14, 1921.]

E. H. LESTER, *Appellant,* v. S. B. MILLS, *Respondent.*[1]

ARBITRATION AND AWARD (16) — CONCLUSIVENESS—EVIDENCE—ADMISSIBILITY. Where an award has been made by arbitrators, the testimony of an arbitrator, in a subsequent action between the parties, is inadmissible for the purpose of varying the award with respect to an item which was a proper subject of the arbitration.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered February 2, 1921, upon the verdict of a jury rendered in favor of the defendant, in an action on account. Affirmed.

Gus L. Thacker, for appellant.

A. E. Rice and *C. D. Cunningham,* for respondent.

PARKER, C. J.—The plaintiff, Lester, commenced this action in the superior court for Lewis county, seeking

[1]Reported in 201 Pac. 752.

recovery of compensation which he claimed to have earned, as against the defendant Mills, for the furnishing of feed in the care of stock for a period of several months following December 5, 1919. Mills' answer contained denials as to the several items of claimed compensation, and also affirmative allegations setting up several items of set-off and counterclaim, concluding with a prayer for an affirmative judgment against Lester in the sum of $1,200. A trial upon the merits resulted in a verdict of a jury awarding Mills recovery against Lester in the sum of $300. A judgment was rendered accordingly; from which Lester has appealed to this court.

The only contention here made in behalf of Lester is that the trial court erred in its ruling which had the effect of deciding, as a matter of law, that Lester could not recover upon any of his claimed items of compensation accruing prior to February 11, 1920, because the proof conclusively showed that upon that date such claimed items had been settled between the parties and fully satisfied, in pursuance of an award of arbitration voluntarily caused by the parties to be made on that day.

On December 5, 1919, Mills, for a period of some five years, had been living upon Lester's farm, in Lewis county, under a ten-year lease thereof. The lease covered the implements and stock upon the farm, as well as the land and buildings thereon; and provided for the payment of rent by a division of the profits of the farm in kind, or the proceeds of the marketing of the produce and increase of the stock, from time to time, and the final division of the undisposed-of produce and increase of the stock, save as the lease otherwise specifically provided, at the termination thereof. The lease contained, among other things, the following:

"At any time during the life of this lease, or at the expiration of same, should the parties hereto not agree in their division or settlement in any form or manner, they hereby agree to submit their differences to three dis-interested persons for arbitration, and agree to abide by their decision."

Early in December, 1919, both parties seemed to have arrived at the tentative conclusion that, by reason of then existing conditions, they would voluntarily terminate the lease as soon as they could arrive at a settlement of their respective rights under the lease upon its voluntary termination; but we think the evidence conclusively shows that they did not effect such a termination of their relations under the lease until February 11, 1920; on which day they voluntarily caused to be made, in pursuance of the above-quoted language of the lease, an arbitration by three disinterested arbitrators, settling their respective rights under the lease at that time; that is, as to what amount either then owed the other in money, and what each was entitled to in the division of the produce and increase of the stock. Settlement was made between them in accordance with the award so made and the leased property then surrendered by Mills to Lester. The award made by the arbitrators is dated February 11, 1920, the day upon which it was actually made, and is in terms in all respects as to all items, in the present tense. Section 9 of the award reads as follows:

"(9) Concerning the grain we find as follows:
"(a) There is a shortage of oats which we place a value of $398.20 on.
"(b) The wheat on the place is to be divided equally between them."

Upon the trial of the case, counsel for Lester interrogated one of the arbitrators, who was then upon the witness stand, as follows:

"Referring to paragraph 9 of defendants' Exhibit C [the award], I will ask you if you took into consideration the grain that had been used by the parties E. H. Lester and S. B. Mills for the feeding of stock up to February 11, 1920, and if in that award and amount fixed, a credit was given to S. B. Mills for that feed so used up?"

Plainly this referred to feed produced upon the farm. Objection to this inquiry was made by counsel for Mills, which was by the court sustained, upon the theory that it was an attempt to exclude, by oral testimony of one of the arbitrators, an item which was a subject of arbitration according to the plain and unambiguous terms of the award read in the light of the submission to arbitration. It is conceded that no attempt was made to impeach the arbitration. We are quite convinced that the ruling of the trial court was correct. 2 R. C. L. 386; 5 C. J. 240.

Counsel for Lester, in asking the question ruled out by the trial court, evidently was proceeding, and is now proceeding, upon the theory that the lease had been actually terminated on December 5, 1919, and that the arbitration was being made as of that date. It is true, as is pointed out by counsel for Lester, that Lester at that time moved into the dwelling upon the leased premises and lived with Mills thereafter, joining with Mills in giving some attention to the care of the stock upon the place. But without reviewing the evidence, we think it sufficient to say that, in our opinion, it conclusively shows that there was no termination, or intended termination, of the lease at that time, and that the relation of the parties continued under the lease undisturbed, so far as their rights thereunder were concerned, up until the arbitration was actually made, and settlement made between them accordingly; which, as we have seen, did not occur until February

11, 1920. We conclude that the trial court did not err in its ruling, though such ruling had the effect of deciding, as a matter of law, that the matter sought to be proven was foreclosed by the arbitration.

Mrs. Mills is a party to this action and, of course, will, with her husband, reap the benefit of the judgment which is here affirmed. Her name is omitted from our discussion merely for convenience of expression.

The judgment is affirmed.

HOVEY, MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16760. Department Two. November 14, 1921.]

GEORGE CLARK *et al., Respondents,* v. THE CITY OF OLYMPIA, *Appellant.*[1]

MUNICIPAL CORPORATIONS (568)—CLAIMS—TIME FOR FILING—EVIDENCE. It cannot be objected that a claim against a city was not filed within the thirty days required by Rem. Code, § 7998, where the evidence shows damage to property through the negligence of the city occurred during the latter part of the month of January and the claim was filed on February 17.

SAME (566) — CLAIMS — RECITALS — SUFFICIENCY. The "items of damages" required under Rem. Code, § 7998, to be set out in a claim against a city are sufficiently specified where the claim sets out in detail the making of a street improvement, a description of the property, the character of the soil, the removal of lateral support, the extent of the slide, and the damages suffered.

SAME (190) — STREETS — IMPROVEMENT — DAMAGES — REMOVAL OF LATERAL SUPPORT. A city is liable for removal of lateral support to property in making an original grade of the street, where it negligently leaves a clay bank exposed, since it is chargeable with knowledge that the bank is likely to slide when subjected to the action of the elements.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered September 12,

[1]Reported in 201 Pac. 755.

1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages through the removal of lateral support. Affirmed.

George R. Bigelow and *William W. Manier,* for appellant.

Geo. F. Yantis, for respondents.

MAIN, J.—The purpose of this action was to recover damages to real property, claimed to be due to the negligence of the defendant in improving one of its streets. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiffs in the sum of $400. Motions for judgment notwithstanding the verdict and, in the alternative, for a new trial were made and overruled. The defendant appeals.

The appellant city is a municipal corporation of the third class, one of the streets of which is Brawne avenue. The respondents own property which abuts upon this street. During the latter part of the year 1919, the appellant improved the street by grading and graveling, but the grade thereof was not made lower than the previously established grade. After the improvement was completed, the surface of the property of the respondents was from four to fifteen feet above the street level. In making the improvement the lateral support of the abutting property was removed except for a one to three slope; that is, for every three feet of elevation, the slope extended into the street one foot. The soil of the bank left exposed was of a clay formation and such as was likely to disintegrate and slide when subjected to the operation of the elements. During the latter part of January, 1920, a slide occurred which extended back on the lot from six to ten feet. There was evidence from which the jury could find that a one to three slope, taking into considera-

tion the character of the soil, was not sufficient to sustain the bank.

After the slide occurred, and on February 17, 1920, the respondents filed a claim with the appellant for damages. It is first contended that this claim did not comply with the statutory requirement in that it was not filed in time and did not contain the "items of damages" claimed by the respondents. The statute, Rem. Code, § 7998 (P. C. § 665), among other things, requires that a claim shall be filed within thirty days after the time when the damages occurred and shall contain the items of damages. The evidence, as appears from the facts already stated, shows that the slide occurred during the latter part of January, 1920, and that the claim was filed on February 17, 1920. There is no merit in the contention that the claim was not filed within the time.

As to the items of damage, the claim sets out in detail the description of the property, the making of the improvement, the character of the soil, the removal of the lateral support, the extent of the slide, and claims damages in the sum of $600. The damages claimed were those resulting to real property and were specified in one item. The claim was sufficient in this respect. *Allbin v. Seattle,* 98 Wash. 275, 167 Pac. 922.

Upon the merits, it is claimed that there was no showing that the appellant city had been guilty of negligence in making the improvement. The evidence shows that the bank was of a clay formation and, as one witness stated, was "treacherous material in lots of ways." The character of the soil was such that the bank was likely to slide when subjected to the operation of the elements, and this fact was known to the officers and agents of the appellant, or they were charged with knowledge thereof. It should be stated

that the evidence was conflicting upon this question, but it presented a matter for the determination of the jury. The case falls within the rule of the cases of *Lochore v. Seattle,* 98 Wash. 265, 167 Pac. 918, and *Allbin v. Seattle, supra,* where it was held that the city is liable for the removal of lateral supports to property in making an original grade of the street, where such city was negligent in leaving a clay bank exposed, knowing, or being charged with knowledge, that it would result in disintegration of the bank and the sliding thereof when the same was subjected to the action of the elements. The appellant relies upon the case of *Schuss v. Chehalis,* 82 Wash. 595, 144 Pac. 916, but the two cases above cited as controlling are the latest expressions of this court upon the question, and the present case is controlled by the holdings in those cases.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16595. Department Two. November 14, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Willapa Electric Company, Respondent,* v. THE PUBLIC SERVICE COMMISSION *et al., Appellants.*[1]

STREET RAILROADS (9-1)—REGULATION—EXTENSION OF CAR LINE—ORDER OF PUBLIC SERVICE COMMISSION—ARBITRARINESS. An order of the public service commission directing a street railway company to extend its line a distance of 900 feet is arbitrary and unreasonable, where its only purpose is to serve a lumber mill in the carriage of lumber cars, there being no other property to serve than the one mill, and that the cost of extension and operation for the mill service would cause an annual loss to the railway company.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered April 18, 1921, reversing on certiorari an order of the public service commission, after a hearing before the court. Affirmed.

The Attorney General and *Raymond W. Clifford, Assistant* (*Fred M. Bond,* of counsel), for appellants.

Welsh & Welsh and *Vance & Christensen,* for respondent.

MACKINTOSH, J.—A writ of review was taken to the superior court from an order of the public service commission (now the department of public works) requiring the Willapa Electric Company to extend its street car line in the city of South Bend. The superior court, on the hearing of the writ, reversed the order, and the public service commission has appealed. The case presents only a question of fact as to whether the action of the public service commission was arbitrary and unreasonable.

[1]Reported in 201 Pac. 749.

The Willapa Electric Company owns the street car system of the city of South Bend, which is devoted almost entirely to the carriage of passengers. The rolling stock of the company consists of three street cars, two of which are operated. On its capital invested, the company's earnings and losses were:

1914	Profit	6.20%
1915	Profit	0.04%
1916	Loss	0.13%
1917	Loss	1.43%
1918	Profit	4.11%
1919	Profit	0.70%
1920	Loss	0.31%

This action before the public service commission was to compel the street car company to extend its line a distance of some 900 feet, to enable lumber to be hauled over the line to a connection with the Northern Pacific Railroad. This proposed extension was to serve a mill, proposed to be rebuilt on tidewater; the car line to be built on a street not yet constructed and for which the right of way had never been acquired by the city. This street was proposed to be built by the city around a big bluff, and the record shows that the city had no funds wherewith to make payment therefor. If extended, the car line would serve no other property than this one mill, which could guarantee no amount of business to the company, but held out the hope that it might furnish an average haul of thirty cars a month. The evidence shows that the cost of the extension to the street car company would be $21,828.86. The greatest possible earning it could expect would be $2,700 a year, and this operation would result in a loss to the company each year of $995.04. In other words, a loss on the new capital invested of 4.56%. There is in the record no proof of a necessity

for the extension, and no proof of any fact justifying the imposition on the utility of this unprofitable business. The only theory upon which the conclusion of the commission can be sustained is that the condition of the street railway is such that another little loss could not do it any harm.

The superior court was correct in holding, under these facts, that the order of the commission was arbitrary and unreasonable, and the judgment of the superior court setting it aside is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16526. Department Two. November 14, 1921.]

JAMES A. BELCHER, *Respondent*, v. TACOMA EASTERN RAILROAD COMPANY, *Appellant*.[1]

CARRIERS (3-2)—COURTS (35)—PREVIOUS DECISIONS AS CONTROLLING—OVERCHARGES. Where, on a prior appeal, the law of the case has been decided as involving the measure of recovery for a violation by a carrier of the long and short haul provisions of the statute, the carrier cannot interpose an objection, in an action to recover upon an award made by the public service commission, that the shipper's case is one based upon discriminatory charges, thereby requiring a different measure of recovery.

APPEAL (473, 475)—REVIEW—FORMER DECISION AS LAW OF CASE—QUESTIONS CONCLUDED. Where a decision on appeal, determining the proper measure of recovery by a shipper against a carrier, by necessary implication found with the public service commission in awarding refund for certain shipments, and the evidence before the court on a subsequent appeal is the same as on the prior appeal, there is nothing in the record to overcome the *prima facie* case as found by the commission.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 19, 1921, upon findings in favor of the plaintiff, in a shipper's

[1]Reported in 201 Pac. 750.

action to recover overcharges for hauling logs, tried on the merits to the court. Affirmed.

F. M. Dudley, Geo. W. Korte, and *A. J. Laughon,* for appellant.

Ellis, Fletcher & Evans and *J. E. Belcher,* for respondent.

PER CURIAM.—This appeal presents the final chapter of litigation which has heretofore occupied the attention of this court, and reference is made to the three former opinions of this court for a statement of the facts about which this controversy has been waged: *Belcher v. Tacoma Eastern R. Co.,* 99 Wash. 34, 168 Pac. 782; *State ex rel. Tacoma Eastern R. Co. v. Public Service Commission,* 102 Wash. 589, 173 Pac. 626; *State ex rel. Tacoma Eastern R. Co. v. Public Service Commission,* 112 Wash. 629, 192 Pac. 1079.

The instant case is the one brought as suggested in the last opinion above referred to, to recover upon the award made the respondent by the public service commission. We take it that the law of this case has been established by these prior decisions and it would be acarpous to again review the many intricate questions involved. The appellant, however, presses upon us that there are some questions which were left open by the prior decisions. One of these affects the measure of the respondent's recovery. It argues that the respondent's case, being based upon discriminatory charges, fixes the recovery at such an amount as would compensate him for the injury to his business resulting from such discrimination, whereas the measure of recovery allowed by the court was the difference between the rate paid by the respondent and the tariff rate, this recovery being such a recovery as is allowed

Although the shingles should have been delivered within a reasonable time after their order, the respondent at that time did not repudiate the contract, and it was not until sometime in August following that the appellants were justified in treating the expressions of the respondent in regard to the order as amounting to an unequivocal refusal to perform. The contract price being $2.10 per thousand, and the evidence showing that, at the time of the repudiation, the fair market price was about $4.60 per thousand, and the evidence showing that each carload contains 200,000 shingles, the appellant is entitled to judgment for $1,000.

Judgment of the lower court reversed, with directions to enter judgment in the amount named.

PARKER, C. J., BRIDGES, MAIN, and MITCHELL, JJ., concur.

FULLERTON, J. (dissenting)—The alleged contract upon which the appellant sues is found in certain letters and telegrams passing between the parties. On January 4, 1919, appellant, from Portland, Oregon, telegraphed respondent at Port Angeles, Washington, as follows:

"Ship medium car extra stars Morris also Boynton Oklahoma two ten mill use order bill lading draft here with papers."

The respondent replied by wire on January 6, 1919: "Message fourth will ship two cars Stars immediately."

On January 6, 1919, the appellant wrote to respondent as follows:

"We have your wire of today advising that you will ship the two cars of shingles immediately to Morris and Boynton, Oklahoma. We are mailing in separate enclosure, formal orders covering."

On January 15, 1919, at 10:15 p.m., the appellant sent this further telegram to the respondent:

"Can you furnish car numbers Morris Boynton. Ship two medium stars as Cheyenne two thirteen."

On January 17, at 10:28 a.m., the respondent sent the following answer:

"Message fifteenth our rates do not apply via Cheyenne will ship Morris Boynton cars next week."

On January 17, before respondent's wire of January 15 was received, the appellant wrote to the respondent as follows:

"Our customer could not wait for the two cars to go to Morris & Boynton, Oklahoma, so we are giving them cars we have in transit. Please change the destination to read Fort Worth, Texas, and be sure and route both cars Plummer, Idaho, O. W. R. & N. OSL. UP. to Denver, and C&S to Ft. Worth, if your agent will accept the routing, under the short haul bulletin, or, if this cannot be accomplished, please ship via South Omaha.

"The other two cars we wired you yesterday are for Texas destination, and trusting that you are prepared to handle them we are sending you formal orders.

"It is our understanding that the bulletin effective Sept. 15, last, rearranging the routings, takes nearly all shingles into Texas, through Cheyenne."

On the following week, as promised in its telegram of January 17, the respondent shipped two cars of extra Star A shingles, changing the destination to Fort Worth, Texas, as directed in the letter last quoted.

On February 1 the appellant telegraphed respondent as follows:

"Ship two medium cars stars us Ft. Worth two twenty net also rush two older orders."

On the same day the respondent replied by telegram as follows:

"Unable to handle order for star shingles. Shingle mill closed down temporarily."

On February 1 the appellant also wrote to the respondent as follows:

"We are today in receipt of copy of your invoice covering car RCNo 13126 with destination, Fort Worth, Texas.

"We are quite sure that you are holding two more of our orders which we trust you will get moving promptly as they are now over three weeks old."

On February 3, 1919, the respondent replied by letter as follows:

"In response to your favor of the 1st inst., will say that all of your orders for Star Shingles have been completed with shipment of car R.C. 131263.

"In your letter you state that you think we are holding orders for two more cars, and will say that such is not the case, as the two orders referred to were returned to you upon receipt."

On February 5, 1919, the appellant wrote to the respondent, referring to prior telegrams and stating its position as follows:

"While we received no formal acceptance of the two cars sent you at $2.13, you billed the two cars shipped at $2.13 and we, of course, concluded that you had accepted the orders and were shipping these two cars ahead of the two which you had at $2.10. Expecting to receive them, we obligated ourselves by going out and buying the Morris and Boynton cars at a loss in order to give our customer service."

On February 10, 1919, the respondent answered this letter as follows:

"We have your favor of the 5th inst., regarding orders for two cars of Star Shingles, of which there

seems to have been some misunderstanding between yourselves and our Port Angeles office.

"The writer is in charge of all sales for the Port Angeles Mill, also for the Crown Lumber Company at Mukilteo, Wn., and all correspondence pertaining to inquiries or orders should in the future be addressed to this office. We are very sorry indeed there was any misunderstanding regarding these shingles and we would gladly make shipment of the two cars in question but for the fact that our mill is closed down, not having been in operation for the past thirty days and we are unable to say at this writing when we will start up again. It is, therefore, impossible to make shipment of any shingles as we have none on hand."

The appellant, on February 13, 1919, answered this letter, asking that the respondent ship the two cars as soon as the mill resumed operations, and on March 20 also requested a shipment. These letters were not answered. There was no further correspondence between the parties until August 21, 1919, when the appellant made another demand for two cars. The respondent replied by setting out its letter of February 10, 1919, and by disclaiming that it had any accepted orders for shingles which it had not fulfilled.

It seems to me that it should require no extended argument to show that the appellant is not entitled to recover. The rule is general that, where the contract claimed must be found in letters and telegrams passing between the parties, and these are capable of different interpretations and are, in fact, differently interpreted, there is no contract. In other words, if the language used in the writings forming the supposed contract may fairly mean either one of two things, each party is at liberty to attach to it his own meaning, and neither, if he acts in good faith, can be held responsible to the other where his understanding differs

from that of the other. Here, in my opinion, the writings are sufficiently indefinite and confusing as to admit of different interpretations. Nor can I find anything in the record that indicates anything other than an honest difference of opinion. There should, therefore, be no recovery, and I am compelled to dissent from the conclusion of the majority holding to the contrary.

But, if I am wrong in the foregoing view of the evidence, I think the recovery awarded too large. As will be seen by the quotation I have made from the respondent's letter of February 10, 1919, the respondent then distinctly repudiated the appellant's claim that it had an accepted unfulfilled order for two car loads of shingles. If, as stated in the majority opinion, the measure of damages is the difference between the contract price and the market price at the time of the respondent's breach of the contract, the price should be determined as of that date rather than of a date in August following. The evidence overwhelmingly shows that the market price of shingles on February 10, 1919, was but a few cents per thousand in advance of the contract price, entitling the appellant to recover but little more than nominal damages, not the very considerable sum the majority have seen fit to award. In this connection, also, I call attention to the further fact that the appellant, by its own showing, has covered any possible loss that could accrue to it by the rise in the price of shingles subsequent to February 5, 1919. By its letter of that date it appears that it had prior thereto supplied its customers by buying the shingles in the open market.

HOLCOMB, J. (dissenting)—I agree with the majority upon the right of appellant to recover, but I agree

with Judge Fullerton as to the measure of damages, on which grounds alone I dissent.

TOLMAN, J. (dissenting)—I concur with Judge Fullerton upon the last ground stated.

[No. 16158. *En Banc.* November 15, 1921.]

ADA M. ROGERS, *Respondent,* v. JOHN E. SAVAGE *et al., Appellants.*[1]

APPEAL (173-175)—REQUISITES—TIME FOR TAKING—SUSPENSION OF RIGHT TO APPEAL—VACATION OF JUDGMENT. The right of appeal of a party, suspended by reason of an erroneous order in his favor, is restored on the later annulment of the order, so that the limitation on his right to appeal from the original judgment does not start to run until the restoration of his right to appeal.

ACTION (23)—JOINDER OF CAUSES—SAME TRANSACTION. A complaint charging defendants with both assault and slander, in such a way as to show the slander was not pleaded for the purpose of showing the aggravated nature of the assault, is demurrable on the ground of misjoinder of causes of action.

Appeal from a judgment of the superior court for King county, John L. Corrigan, Judge *pro tempore,* entered November 7, 1919, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Piles & Halverstadt, for appellants.

Van C. Griffin, for respondent.

MACKINTOSH, J.—This case was before this court on a prior appeal by the plaintiff from an order of the trial court vacating a judgment entered by the clerk on the verdict of the jury, and granting a new trial. *Rogers v. Savage,* 112 Wash. 246, 192 Pac. 13. It was there

[1]Reported in 201 Pac. 768.

held that the record failed to show any order or instruction by the court directing the clerk not to enter a judgment on the verdict; that the judgment was properly entered by the clerk on the verdict, in accordance with the mandate of the statute, Rem. Code, § 431 (P. C. § 8081), and the trial court, having regularly denied the motion for judgment *non obstante veredicto* and a motion for a new trial, could not thereafter reconsider the motion for a new trial, grant the same, and direct the judgment to be set aside. The order of this court was:

"Reversed and remanded to the trial court with direction to set aside the order granting the respondent's motion to set aside the judgment, and also to set aside the order of December 18, 1919, vacating and setting aside the order of November 7, 1919, denying the motion for a new trial."

The trial court complied with the ruling of this court upon the going down of the remittitur and set aside both orders on September 25, 1920, and thereafter, on October 4, 1920, the defendants gave notice of appeal to this court from the original judgment, which was entered by the clerk on November 7, 1919.

The plaintiff, respondent here, moved to dismiss the appeal because not taken within the statutory time from the rendition of the judgment appealed from. The defendants, appellants here, first contend that the prior decision of this case has been overruled by this court in *Buckley v. Harkens,* 114 Wash. 468, 195 Pac. 250, but in that case the record clearly shows, and this court found, that the trial court instructed the clerk to withhold the entry of the judgment on the verdict until its further order, hence the two cases are clearly distinguishable.

It is next contended that the judgment of the trial court setting aside the judgment entered by the court

having been annulled by this court on appeal, the statutory time for appeal from the first judgment begins to run only from the time the decision of this court becomes effective. The statute, Rem. Code, § 1718 (P. C. § 7292), provides:

"In civil actions and proceedings an appeal from any final judgment must be taken within ninety days after the date of the entry of such final judgment."

And it would seem at first thought that this is conclusive, though to so construe the statute would work great hardship in such a case as this, because the appellants, who were the judgment debtors, would be, under the circumstances of this case, denied the right of appeal, which the statute clearly intends that they shall have. The judgment against them from which they now appeal was rendered on November 7, 1919. It was set aside by the court on December 6, 1919, hence within thirty days, or before the time for appeal had expired, there became nothing from which they could appeal, and the court having made an order granting their motion for a new trial, all reason for appeal upon their part ceased. The plaintiff, however, feeling aggrieved by the court's order of December 6, 1919, setting aside the judgment, exercised her right to take an appeal from that order, which appeal was successful, resulting in a holding that the order of December 6, 1919, was in excess of the trial court's jurisdiction and therefore void, and a reinstatement of the judgment of November 7, 1919. This decision was filed on August 18, 1920, and the remittitur putting it into effect reached the trial court on September 25, 1920, when for the first time appellants were apprised of the fact that there was something from which they could appeal. The right of, or reason for, an appeal being suspended by the setting aside of the judgment,

the time for appeal should likewise be held to be suspended during the same period. Authorities are not numerous upon this subject, and the industry of counsel has brought to our attention only the following:

"Where the right of appeal is suspended, an appeal is in time if taken within the statutory period after the right is restored. Therefore, where a judgment of the lower court, substituted by it in place of one previously rendered, has been annulled on appeal, there is the statutory period from the time of this decision of the appellate court in which to appeal from the first judgment." 2 R. C. L. 105, § 80.

This text seems to be based upon only the case of *Flint v. Cuny,* 7 La. 379, 26 Am. Dec. 505, which squarely so holds. In the absence of any contrary authority, and in the interests of justice, we feel justified in adopting the rule as quoted, and the motion to dismiss is therefore denied.

The errors assigned upon the merits bring up only the following: Plaintiff, by her first or original complaint, alleged as one cause of action:

"That on or about December 29, 1918, the defendants, without just cause or provocation, and acting together and jointly, assaulted and attacked plaintiff, pulled her hair, struck her many angry and violent blows upon the head and in her face, and upon her arms, and wrenched and twisted her arms in a most cruel manner, causing her most excruciating pain, humiliation and mental anguish.

"(3) That on or about the 29th day of December, 1918, at the Hotel New Cecil, in Seattle, King county, Washington, said defendants, and each of them, in the presence of plaintiff and other people, maliciously spoke of and concerning the plaintiff herein defamatory words and language, which injured and impaired the reputation of plaintiff for virtue and chastity, and which exposed her, or tended to expose her, to con-

tempt and ridicule, the said plaintiff then and there being a female person over the age of twelve years."

The defendants moved against this complaint, asking that it be made more definite and certain by separately and distinctly setting forth the different causes of action therein alleged, or, in the alternative, requiring the words alleged to have been maliciously spoken to be set out. This motion being granted, the plaintiff filed an amended complaint, in which she alleged the assault as one cause of action, and the slander as a second cause of action, asking for judgment for $2,000 on the first cause of action, and for $8,000 on the second cause of action. To this complaint the defendants demurred on the ground of misjoinder of causes of action, which demurrer was sustained. The plaintiff then filed a second amended complaint, the charging part of which is as follows:

"That on or about December 29, 1918, at the New Cecil Hotel, in Seattle, Washington, defendants, without just cause or provocation, and acting together and jointly, assaulted and attacked plaintiff, pulled her hair, struck her many angry and violent blows upon her head and in her face, and upon her arms, and wrenched and twisted her arms in a most cruel manner, causing her most excruciating pain, humiliation and mental anguish at said time and place; and while so assaulting said plaintiff, said defendants, and each of them, in the presence of plaintiff and other people, falsely and maliciously spoke of and concerning the plaintiff herein defamatory words and language, which injured and impaired the reputation of plaintiff for virtue and chastity, and which exposed her, or tended to expose her, to contempt and ridicule, said plaintiff then and there being a female person, over the age of twelve years. Defendants and each of them, said to plaintiff: 'You are a bum'; 'You are a whore' and used other language too vile and vulgar to be set forth herein. All of which language accused plaintiff

of being a prostitute, and said language was used in the presence of many people, the exact number of whom are to plaintiff unknown."

Defendants moved for an order striking this complaint, first upon the ground that it contained more than one cause of action not separately stated; and second, that it was a reiteration of the original complaint, which, on their motion, the court had ordered stricken. This motion was denied, as was also defendants' demurrer upon the ground that several causes of action were improperly joined therein. The cause went to trial upon this second amended complaint, and after the jury was empaneled, the defendants moved the court to require the plaintiff to separately state and number her causes of action and to elect upon which cause of action the case would go to trial, which motions were denied. Defendants excepted to the ruling. Trial was had, resulting in a verdict for plaintiff for $5,000, which, upon motion for a new trial, the court required to be reduced to $3,000, from which judgment this appeal is prosecuted.

Appellants' contention is that the complaint states a cause of action for assault and a cause of action for slander, not separately stated and numbered as the statute requires, and that respondent was permitted to try her case as though prosecuting a cause of action for assault and another for slander. Appellants rely chiefly upon the case of *Konick v. Champneys,* 108 Wash. 35, 183 Pac. 75, in which it is said:

"The complaint, therefore, states two causes of action, and the question arises, are they improperly united. The appellant argues that they are not, and calls to his assistance that section of the code which permits two or more causes of action to be united in one complaint when they arise out of the same transaction. Rem. Code, § 296. But we cannot think the statute aids the appellant."

After quoting from Pomeroy's Remedies and Remedial Rights, and from *Anderson v. Hill,* 53 Barb. (N. Y.) 238, the court proceeds:

"Within the principles here announced, the complaint plainly improperly unites two causes of action; and since the code, as we have shown, makes the improper uniting of two or more causes of action a distinct ground for demurrer, the demurrer was properly sustained."

This case is undoubtedly good authority for the ruling of the trial court upon the first or original complaint, because the pleader there did not in any way connect the assault and beating with the use of the defamatory language referred to. It is also good authority for the sustaining of the demurrer to the first amended complaint, because there it was plainly attempted to plead a cause of action for assault and another cause of action for slander, which may not be joined in the same action. See cases cited in *Konick v. Champneys, supra.* And the second amended complaint, the charging part of which we have hereinbefore quoted, in our judgment, does plead two causes of action, one for assault and one for slander, and in the very language of the statute on slander, and in such a way as to show that it was not pleaded for the purpose of showing the aggravated nature of the assault, which might properly be done. *De Leon v. Doyhof Fish Products Co.,* 104 Wash. 337, 176 Pac. 355. The language contained in the second amended complaint is unnecessary and even improper in a complaint for assault, and the defendants, at every opportunity, attempted to preserve their rights as against such pleading, and the court erred in overruling the demurrer.

The court gave certain instructions applicable to a cause of action for slander, to which the defendants took no exception and have assigned no errors thereon.

Although the court denied their motion and overruled their demurrer directed to the second amended complaint, upon the theory that it stated but one cause of action, that for assault, these instructions allowed the jury to return a verdict for damages for slander, such instructions being but further proof of error made in allowing the case to go to trial on the second amended complaint.

The judgment appealed from is reversed, with order to sustain the defendants' demurrer.

PARKER, C. J., BRIDGES, MAIN, and HOVEY, JJ., concur.

FULLERTON and TOLMAN, JJ., concur in the result.

HOLCOMB, J. (concurring)—I have grave doubts as to the correctness and wholesomeness of the decision on the motion to dismiss appeal. I concur as to the remainder of the opinion.

[No. 16487. Department One. November 15, 1921.]

PATRICK WILLIAMS, *Respondent*, v. T. W. LITTLE COMPANY, *Appellant*.[1]

APPEAL (418)—REVIEW—FINDINGS. In an action for commissions on the sale of trucks, where questions of fact are alone involved, the findings of the trial court on conflicting evidence will not be disturbed on appeal, where the evidence does not clearly preponderate against the findings.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 22, 1920, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Burkey, O'Brien & Burkey, for appellant.

A. O. Burmeister and *J. H. Gordon*, for respondent.

[1]Reported in 201 Pac. 756.

TOLMAN, J.—Respondent, as plaintiff, brought this action to recover a commission of five per cent alleged to have been earned upon the sale of certain trucks, amounting to $495, less $100 paid on account, praying for judgment in the sum of $395. The case was tried to the court without a jury, resulting in a judgment as prayed for, from which the defendant has appealed.

The principal defense urged below, and relied upon here, is, in substance, that respondent, at and before the time when the sales were made, represented to appellant that he was organizing a truck company, or an association of truck owners, of which he would be the manager; that he had secured work for the trucks, would keep them employed, collect their earnings, and, after paying operating expenses, would from such earnings make the monthly payments on the purchase price, according to the terms of the conditional sales contracts which were to be, and in fact were, taken by appellant from the purchasers of the trucks; that appellant relied upon these representations; would not otherwise have made either of the sales with so small a down payment, and agreed to pay the commission only after three or four of the monthly payments had been made according to contract, thus reasonably insuring the seller from loss by reason of the purchasers' default. Respondent does not contend that he kept the trucks employed for any considerable length of time, or that he ever collected the earnings, or saw to the application thereof to the deferred payments; and while denying that he made any express or positive representations regarding the matters claimed, does contend that he told appellant that he was trying to effect such an organization; that he then had work in sight for the trucks, and that he would have been able to place them in steady employment if they had been

delivered at the time agreed upon. He denies that there were any conditions in the agreement to pay him a commission, except that the commission should be due when each purchaser had completed his first monthly payment.

In the last analysis, there is involved here only questions of fact, and after a study of the evidence as brought to this court, we are unable to say from the typewritten record that the evidence preponderates against the trial court's findings, or that, at the close of the arguments by counsel, when the evidence was fresh in his mind, and the impression created by the appearance of the witnesses and their manner of testifying had not been eradicated by lapse of time, the trial judge was wrong when he said:

"The Court: The defense claims a condition that Mr. Williams should not receive this commission unless he kept the trucks in operation until they were paid out. I cannot find from the evidence anything except that Mr. Williams urged them to the effect that he believed he could keep the trucks in operation. That may have been in entire good faith, but no condition was put in that they would not pay the commission unless he did.

"I am satisfied that Mr. Williams is entitled to his commission and that the defense is not sustained by the proof at all."

We find no sufficient reason for interfering with the judgment of the trial court, and it must be affirmed.

Judgment affirmed.

PARKER, C. J., MACKINTOSH, and MITCHELL, JJ., concur.

[No. 16458. Department One. November 16, 1921.]

G. D. GRANT, *Respondent*, v. JOHN TEN HOPE *et al.*, *Defendants*, GUY SYFORD *et al.*, *Appellants*.[1]

FRAUDS, STATUTE OF (20)—BROKER'S COMMISSIONS—CONTRACT TO PAY FOR PAST SERVICES. A contract between parties to the exchange of properties in which it is agreed to pay a broker a commission for services in carrying out the transaction is one on its face for past services and does not necessitate the written contract between broker and principal required by Rem. Code, § 5289, in case of an agreement for the employment of a real estate broker.

BROKERS (13)—COMPENSATION—PERFORMANCE OF CONTRACT OF EMPLOYMENT. Where, in a contract for the exchange of properties, time is not the essence of a provision allowing either party thirty days to make good any defect in his title, a tender of a good title on the thirty-first day is sufficient, and a wrongful rejection of such tender would not defeat the broker's right to compensation promised him by the party who refused to perform the contract.

JUDGMENT (212) — CONCLUSIVENESS—PERSONS NOT PARTIES. A decree cancelling a contract for the exchange of properties, to which a broker who had rendered services in bringing about the exchange was not a party, would not bar the broker from enforcing any right to compensation earned.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered July 15, 1920, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

J. Charles Dennis and *W. McB. Perrin*, for appellants.

H. R. Lea, for respondent.

TOLMAN, J.—Respondent, a real estate broker, procured the defendants Ten Hope and wife, as parties of the first part, and the defendant Guy Syford, as party of the second part, to enter into a written con-

[1]Reported in 201 Pac. 750.

tract for the exchange of real estate, dated January 3, 1914, which, among other things, provides:

"Whereas, the parties of the first part, and the party of the second part are desirous of making an exchange of real estate, the parties of the first part in consideration of one dollar ($1.00) paid by the party of the second part, receipt of which is hereby acknowledged, agrees to sell to the party of the second part, and the party of the second part agrees to buy of the parties of the first part, to wit:"

Then follows a description of the Ten Hope property, which is admittedly complete and sufficient except that the township is given as "Township 9" instead of "Township 9 North", and no mention is made of the county and state in which the land lies. After setting forth the encumbrances to be assumed, the contract proceeds:

"The parties of the first part agree with the party of the second part that these above described lands have a perpetual water right to such lands, the same having been paid up in full and all water rents have been paid to date.

"In consideration of the sum of one dollar ($1.00) paid by the parties of the first part to the party of the second part, receipt of which is hereby acknowledged, the party of the second part agrees to sell and the parties of the first part agree to buy the following property:"

Then follows a description of the Syford property, which is admittedly correct.

"Both parties agree to furnish complete abstracts of title to their respective properties within fourteen days from date of this agreement. In case the title of either of these properties should be defective, then the owner of the respective property should have thirty days from date that such notice is given of such defect in which to correct the same. Such abstracts to be examined within six days of the delivery thereof. . . .

The party of the second part shall have one week from the signing of this agreement in which to examine the land and must give notification of acceptance or rejection within this period to G. D. Grant, acting agent.

"It is further agreed that the parties of the first part shall pay G. D. Grant $500 as their share of the commission for his services in carrying out this transaction, to be paid as follows: $50 in cash; the balance in three equal payments in 30, 60 and 90 days. It is further agreed that the party of the second part shall pay G. D. Grant as his share of the commission $300 for services of said Grant in this transaction.

"This agreement shall be null and void if not signed by both the first and second parties thereto. It shall also be void if the said second party should give notice of rejecting the above described land."

The exchange was not consummated because Syford claimed that there was a cloud upon the title to the property of the Ten Hopes, gave notice thereof according to the terms of the contract, and the cloud not being removed within thirty days from the giving of the notice (although its removal was tendered on the thirty-first day and there is no provision of the contract making time the essence thereof), Syford brought an action against the Ten Hopes, to which respondent was not a party, resulting in a decree cancelling the contract.

His commission not having been paid, respondent brought this action against both parties to the contract, resulting in a judgment against the Ten Hopes for $500, from which no appeal has been taken, and a judgment against Syford and the Syford Mortgage & Realty Company (the undisclosed principal for whom Guy Syford was acting) for $200, there having been a written agreement to reduce the sum named in the contract to this amount.

Syford and the Syford Mortgage & Realty Company appeal, raising the following points: (1) that the

action is barred by the statute of frauds because the contract does not contain a sufficient description of the Ten Hope land; (2) that respondent failed to procure a purchaser ready, able and willing to purchase as required by the contract; and (3) that respondent failed to effect an exchange of the properties within thirty days, or at all, and hence is not entitled to recover.

(1) The statute (Rem. Code, § 5289) provides that, "an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission" shall be void unless in writing and signed by the party to be charged. Clearly this is not such a contract, as it purports to give no authority to the agent or broker, and, as we read it, the broker's services had already been performed in bringing the parties together and procuring the contract to be signed. The things still to be done were such as must be done by the parties themselves, and while it may have been understood that the broker would render them such assistance as he might without further charge, still it clearly appears that the contract neither authorized nor required him to do anything more. Assuming, without deciding, that the description of the land was insufficient, still under the authority of *Muir v. Kane,* 55 Wash. 131, 104 Pac. 153, 19 Ann. Cas. 1180, 26 L. R. A. (N. S.) 519, and *Henneberg v. Cook,* 103 Wash. 685, 175 Pac. 313, in which the subject is fully discussed, we hold that the statute of frauds does not apply.

(2) Discussing together the two remaining contentions, and assuming that, if one of the parties had been unable to perform, the other would not be liable to pay the commission, still the evidence is clear that the so-called cloud was of a nature which gave rise to an honest difference of opinion as to whether or not the

title was thereby affected; that Ten Hope was at all times eager to close the trade; was delayed in part by appellant's attempt to sell him the furniture in the property to be conveyed, believing that the transaction depended upon his purchasing the furniture rather than in removing the cloud, and when finally convinced that Syford would insist on the payment of $350 as the amount required to remove the cloud, he proceeded promptly to raise that sum of money and obtained it in time to and did tender it on the 31st day after the giving of the notice. All this, in view of what the contract contains and does not contain, *i. e.*, "this agreement shall be null and void if not signed by both parties hereto. It shall also be void if the said second party shall give notice of rejecting the above described land," without a word making time of the essence, or indicating a right to cancel or rescind upon the failure to furnish abstracts, examine them, examine the land, or cure the defects within the time limits of the contract, convince us that Ten Hope was able and willing to perform, and the failure to complete the exchange was due to the appellants' wrongful rejection of the tender.

We are not concerned with the decree in the action between appellants and Ten Hope, as the respondent was not a party thereto nor bound thereby, and can see nothing in appellants' offer of that decree in evidence in this case, or the manner in which it was received, which tends to make it binding upon respondent.

Finding no error, the judgment is affirmed.

PARKER, C. J., FULLERTON, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 16631. Department One. November 16, 1921.]

JOHN E. CARTON, *Respondent*, v. EYRES & SEATTLE DRAYAGE COMPANY *et al.*, *Appellants*.[1]

CARRIERS (78-2, 88)—PERSONAL INJURIES—COLLISION WITH VEHICLE—OVERLOADING OR CROWDING CAR—QUESTION FOR JURY. While a carrier is not negligent in permitting a passenger, if he so chooses, to ride in a crowded car, yet a carrier's employees in charge of a car so crowded that passengers are obliged to stand, or occupy positions upon the platform or steps, are obliged to operate the car with due care in the light of those facts.

SAME. Whether a passenger voluntarily chose to board a crowded street car and whether the car was thereafter operated with due care in the light of its crowded condition, are questions for the jury.

SAME (102, 107) — OVERLOADING OR CROWDING CAR — PROXIMATE CAUSE OF INJURY—QUESTION FOR JURY. Whether the proximate cause of a passenger's injury was his position upon the steps of a street car, pressed so closely against the gate that he fell when the gate was torn off by a collision with a motor truck, is a question for the jury.

DAMAGES (109)—EVIDENCE—PHYSICAL CONDITION OF PERSON INJURED—ADMISSIBILITY. Evidence of the neurasthenic condition of plaintiff in an action for damages for personal injury was admissible under allegations of the complaint that injury to his head has caused him great pain; that he has suffered from loss of memory and his eyesight and hearing have been affected; that ever since the accident he has been incapable of mental activity, and suffers from despondency, mental and physical depression, and insomnia.

DAMAGES (81)—PERSONAL INJURIES—EXCESSIVE VERDICT. A judgment for $7,500 for personal injuries is excessive, and plaintiff should be required to remit $2,500, where the evidence shows he suffered no permanent injury, but is suffering from traumatic neurasthenia, which prevents his working full time.

Appeals from a judgment of the superior court for King county, Hall, J., entered February 25, 1921, upon the verdict of a jury rendered in favor of the plaintiff for $7,500 for personal injuries sustained by a passen-

[1]Reported in 201 Pac. 737.

ger through a collision between a street car and an auto truck. Reversed, unless $2,500 is remitted.

James B. Murphy, Henry J. Gorin and *Ward C. Kumm,* for appellant Eyres & Seattle Drayage Company.

James B. Howe, H. S. Elliott, and *R. G. Sharpe,* for appellant Puget Sound Traction, Light & Power Company.

Ballinger, Battle, Hulbert & Shorts, for respondent.

TOLMAN, J.—Respondent, as plaintiff, brought this action to recover for personal injuries received by him while a passenger on a street car operated by the Puget Sound Traction, Light & Power Company, in the city of Seattle, alleged to have been caused by the concurring negligence of both defendants, as a result of which negligence a collision occurred between the street car and an auto truck operated by the defendant Eyres & Seattle Drayage Company, and respondent suffered the injuries complained of.

The cause was tried to a jury, which rendered a verdict against both defendants in the sum of $7,500, and from a judgment thereon, the defendants prosecute separate appeals.

The negligence charged against the traction company in the complaint is: (1) in allowing respondent to board the street car when it was already filled beyond its capacity, so that it was impossible for him to get into the car or even upon the platform, and he was obliged to remain upon the steps, the gate behind him being immediately closed and the car started; (2) operating the street car at a high, dangerous and reckless rate of speed; and (3) failure upon the part of the motorman to keep a proper lookout and to have proper control of his car so as to see the auto truck

in time to avoid the collision, notwithstanding the negligence of the driver of the truck.

At the conclusion of the introduction of the evidence, counsel for the traction company moved that the question of the crowded condition of the street car be taken from the jury, for the reason that respondent's position upon the front steps of the car was not a contributing cause of the accident but an incident merely. This motion was denied, and an exception taken to the ruling. The trial court, in his instructions to the jury, read that portion of the complaint alleging negligence in permitting the respondent to board the car under the conditions hereinbefore set forth, and charged the jury:

"If you find from a preponderance of the evidence that the defendant traction company was negligent in one or more particulars substantially as alleged in plaintiff's complaint, and that said negligence was a proximate cause of plaintiff's injuries and plaintiff was damaged thereby, then your verdict should be for the plaintiff and against the said defendant traction company. If you do not so find, then your verdict should be in favor of the defendant traction company."

The traction company now urges that it was reversible error to refuse to take from the jury the question of the crowded condition of the car, and to expressly, by the instruction just referred to, submit to the jury this issue, for the reasons that respondent was shown to be the last passenger to board the car, and assumed the added risk, if any; that, under the conditions shown, the carrier was not negligent in permitting him to board the car and ride where he did; and, in any event, the fact that respondent was riding on the steps was not the proximate cause of the accident.

By appellant's abstract, respondent's testimony as to the conditions under which he entered the street car, as shown by his examination in chief, are as follows:

"I was hurt on March 26th. Skinner & Eddy's was down on Railroad avenue about five or six blocks south of King street. On the 26th of March, 1919, about 10 minutes after four, I was loaded on a street car just after I had ended my shift. There were about 10,000 men quitting in that shift. They had a terminal there where the cars were turned around, and they started them off so that a car left every fraction of a minute. They had a starter loading the cars from the front end and the conductor loaded them from the rear end. There was quite a crowd around the rear end of the car, so I ran up to the front end to get on in a hurry, where there were not so many men, and they let me on at the front end. I was the only man to get on there. When I got on I found it was so crowded that I could not get in any further, and they just barely got the gates closed. I didn't have time to notice this congestion until I got up there. The car started immediately after I got on. I tried to push farther into the car, but it was impossible because of its crowded condition. There were as many men on the steps as could get on —how many I could not say. There were about 15 or 20 men on the front platform. I couldn't see in the car because I could just barely turn my head. That is how tight I was jammed in. I was on the last step. After the street car started it stopped at Railroad Way, about two blocks from where we had started. There were no stops from there until the place of the accident, about two or three blocks beyond."

And on cross-examination:

"There were probably ten or twelve street cars waiting there at the shipyard. They would go out just as soon as they were loaded. I didn't notice particularly how many cars were ahead of the car I got on or how many back of it—probably one or two. The reason I did not get on one of the others was because I saw there were a great many men waiting around

and I saw a chance to get on and I ran and got on the front end of the car where nobody was getting on. I tried to get into the rear end first. There were probably 6 or 8 getting on the front end and 20 or 30 on the rear, and so I ran up to the front end because I thought I had a better chance to get on. I was the last man to get on the front end. I think there were two steps and the platform on the front end of the car which was a 500-style. I had one foot on the first step and one on the second step."

Upon the subject of the over crowding of public conveyances the authorities are legion, and it would be a hopeless task to attempt to harmonize them. We think, however, that the great majority of the well-considered cases recognize these rules: (a) that a carrier is not negligent in permitting a passenger to ride in a crowded car if he chooses to do so, and (b) a carrier's employees in charge of a car so crowded with passengers that they are obliged to stand, or occupy positions upon the platform or steps, are bound to operate the car with due care in the light of those facts. *Kebbee v. Connecticut Co.*, 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C 167; *Becker v. Interborough Rapid Transit Co.*, 128 App. Div. 455, 112 N. Y. Supp. 816; *Hansen v. North Jersey St. R. Co.*, 64 N. J. L. 686, 46 Atl. 718; *Mobile Light & R. Co. v. Hughes*, 190 Ala. 216, 67 South. 278; *South Covington & C. St. R. Co. v. Harris*, 152 Ky. 750, 154 S. W. 35; *Reem v. St. Paul City R. Co.*, 77 Minn. 503, 80 N. W. 638, 778. Adopting these rules, it is apparent that the trial court did not err in the ruling complained of, because it was for the jury to determine whether or not respondent voluntarily chose to board a crowded car, and if he did so choose, whether the car was thereafter operated with due care in the light of the known conditions. Nor can we say, as a matter of law, that respondent's position upon the steps, pressed so closely against the gate that

he fell when the gate was torn off by the collision, was not a proximate cause of the accident. No passenger, other than respondent, was, so far as here appears, injured, and it was for the jury to say whether respondent's position, involuntarily taken, as they might find it to be, was a cause but for which the injuries would not have been received. Perhaps, if requested, the traction company might have been entitled to have the jury instructed upon the "but for which" doctrine as defined in *Ross v. Smith & Bloxom,* 107 Wash. 493, 182 Pac. 582, but the record here does not present that question.

We have carefully considered all of the traction company's other assignments of error, and aside from the one based upon the amount of the verdict, which will be considered in discussing the appeal of the drayage company, find none of them well taken. There was sufficient evidence to go to the jury upon each ground of negligence alleged, and the jury was properly instructed.

Turning now to the appeal of the drayage company. It is urged that the trial court erred in admitting testimony as to the neurasthenic condition of respondent, and permitting the jury to consider the same. The complaint, among other things, charges:

"That he has suffered great pain and will continue to suffer in the future; that the injury to his head has caused him great pain in the head; he has suffered from the loss of memory, and his eyesight and hearing has been affected. That ever since the said accident he has been incapable of mental activity and suffers from despondency and mental and physical depression and insomnia."

The only motion directed to this part of the complaint was one asking that the respondent be required to state which of his injuries were permanent, and we

think, in the absence of anything else, the complaint was sufficient to permit the introduction of the evidence complained of, even though in describing respondent's condition the expert witnesses used a term not mentioned in the complaint.

We find no error in the sustaining of objections to certain questions propounded to an expert medical witness, or in refusing the requested instruction of which complaint is made; but the length of this opinion precludes the discussion thereof.

The drayage company's final assignment of error was also raised by the traction company, and is to the effect that the verdict is excessive. The evidence tends to show that respondent was twenty years old at the time of the accident, had always enjoyed good health, was earning good wages as a driller, and that, following the accident, he was in bed for a week or two, confined to his home for a month or two thereafter, and went to work at light employment about three months after the accident; later obtained a position as a street car motorman, and still later as a checker on the docks, though he complains that, because of his physical condition, he could not work full time at any of these occupations, and frequently became so sick and exhausted as to be obliged to lay off for a time. Medical witnesses, including the doctor who attended him immediately after the accident, and those who examined him later, have not pointed out anything organically wrong with him, except one or two who say that his heart is slightly enlarged. "The heart was not very much enlarged—only very slightly. The enlargement did not alarm me, and might possibly have been the natural size for him. I meant that it was a little larger than the average heart of a person of that size."

There is little, if any, direct evidence that the injuries are necessarily permanent in character, and taking respondent's showing of the nature of his injuries, subsequent suffering and present physical condition as though admitted, we cannot find therein anything to justify the amount of the verdict. Respondent's condition is much like that described in *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160, and, as in that case, may be classified as traumatic neurasthenia. It was there said:

"An allowance of damages in cases of traumatic neurasthenia touches the border of speculation at best, . . ."

We are convinced that the amount of the verdict in this case is so disproportionate to the injuries sustained as to indicate that the jury was influenced by passion and prejudice. We think a recovery of $5,000 is the extreme amount warranted by the most favorable view of the evidence.

If, within thirty days after the going down of the remittitur, respondent shall file a remission of all above $5,000, the judgment will stand affirmed for that amount; otherwise the judgment will be reversed and the cause remanded with instructions to grant a new trial. In either event, appellants will recover their costs in this court.

PARKER, C. J., MITCHELL, and BRIDGES, JJ., concur.

[No. 16609. *En Banc.* November 16, 1921.]

THE STATE OF WASHINGTON, *on the Relation of Ladd & Tilton Bank, Plaintiff,* v. THE SUPERIOR COURT FOR LEWIS COUNTY, *John M. Wilson, Judge, Respondent.*[1]

CERTIORARI (5)—WHEN LIES—INTERLOCUTORY ORDERS—APPEAL—FINAL ORDERS. An interlocutory order requiring the drawer of a trade acceptance to be made a party defendant to a suit by the assignee against the acceptor of the trade acceptance is not reviewable by certiorari in advance of the final judgment in the action.

Application filed in the supreme court June 18, 1921, for a writ of certiorari to review an order of the superior court for Lewis county, Wilson, J., entered June 10, 1921, allowing defendant to bring in an additional party. Denied.

Hull & Murray, for relator.

C. A. Studebaker, for respondent.

HOLCOMB, J.—The relator brought the original action, as plaintiff, against one Frank Rosenstein, as defendant, in the superior court of Washington for Lewis county, upon two trade acceptances for $1,258.85 each, for the amount thereof with protest fee, drawn upon the defendant Rosenstein, accepted by him, and thereafter assigned by R. M. Wade & Company, the drawer, to plaintiff, Ladd & Tilton Bank. Payment of the trade acceptances to Ladd & Tilton Bank was refused by Rosenstein, and they were protested.

After the service of summons and complaint in the original action, defendant appeared and moved for an order permitting the defendant to make R. M. Wade &

[1]Reported in 201 Pac. 782.

Company, a corporation, a party plaintiff or defendant in the action, and based the same upon an affidavit of the defendant Rosenstein to the effect that the trade acceptances were for two motor tractors sold and delivered to Rosenstein by R. M. Wade & Company, upon certain alleged guarantees which had been breached, all of which R. M. Wade & Company knew, and it was alleged that Ladd & Tilton Bank, a corporation, was aware of the guarantees of R. M. Wade & Company, a corporation, and of the failure of the guarantees, and that Ladd & Tilton Bank well knew, at the time of the existence of the contract between R. M. Wade & Company and defendant Rosenstein, of all rights, duties and equities existing between those parties, and purchased the two trade acceptances with such knowledge, and with a secret understanding whereby R. M. Wade & Company agreed to stand back of and protect Ladd & Tilton Bank against any loss which the plaintiff might incur on such trade acceptances; and that R. M. Wade & Company and Ladd & Tilton Bank were in collusion to compel defendant Rosenstein to pay the amount of the trade acceptances to Ladd & Tilton Bank as though Ladd & Tilton Bank were an innocent party. It was also deposed in the affidavit that, unless R. M. Wade & Company be made a party to the action, defendant Rosenstein might be required to pay the trade acceptances, and also pay damages to the persons to whom such tractors had already been sold, to the loss of defendant Rosenstein in not less than the sum of from $5,000 to $6,000, all of which would be occasioned by the fraud of R. M. Wade & Company, and due to its failure to keep its contract, and to the fact that R. M. Wade & Company had induced plaintiff to bring an action as though plaintiff were an innocent party, when in fact plaintiff was not an innocent

party, but had full knowledge of all matters and things alleged by defendant, and had such knowledge at the time the trade acceptances came into its possession, and that plaintiff, Ladd & Tilton Bank, was not the holder of such paper in good faith.

The respondent judge, on June 8, 1921, made an order reciting that the motion of defendant to require R. M. Wade & Company, a corporation, to be made a party to the action came on regularly for argument, and having taken the matter under advisement, he found that R. M. Wade & Company, a corporation, is a proper and necessary party to the full and complete determination of the action; and ordered that R. M. Wade & Company, a corporation, be made a party plaintiff or defendant.

This action is before us on an application for a writ of certiorari to review the order of the respondent judge, and the return of the respondent thereto, setting forth that the order was made upon the motion and affidavit, and upon a hearing of both parties.

We have no appearance or brief on behalf of the adverse party to the original suit, or respondent in this proceeding.

Relator relies upon Rem. & Bal. Code, §§ 271½, 272, 273 and 367, and our late decision in *State ex rel. Alaska Pacific Navigation Company v. Superior Court*, 113 Wash. 439, 194 Pac. 412. In the case above cited, the procedure seems not to have been questioned.

We have held in *State ex rel. Langley v. Superior Court*, 73 Wash. 110, 131 Pac. 482, that such an order as the one here involved differs "in no respect from interlocutory orders generally; . . . As such, they are not reviewable in this court in advance of the final judgment entered in the cause, but must be reviewed here, if reviewed at all, on an appeal or writ of review taken from the final judgment."

This case was reaffirmed in *State ex rel. Rutter v. Superior Court*, 91 Wash. 304, 157 Pac. 684.

On the authority of these cases, the writ must be denied.

Denied.

All concur.

[No. 16691. Department One. November 16, 1921.]

B. F. Reed, *Appellant*, v. Tacoma Railway & Power Company, *Respondent*.[1]

Street Railroads (34)—Actions for Injuries—Contributory Negligence—Instructions. In an action for injuries resulting from a collision between a street car and an automobile, an instruction that if the driver of the automobile erred in thinking she had time to drive upon the car tracks and off again before the car reached her, while in fact she did not have sufficient time, she could not recover, was erroneous, since error of judgment is not necessarily negligence.

Same (34)—Instructions—Familiarity With Location. Familiarity or lack of familiarity by the driver of an automobile with the location and situation of street car tracks and the several streets at the place of a collision between a street car and an automobile has nothing to do with the question of the driver's contributory negligence in driving on a car track in front of an approaching street car.

Same (33)—Instructions—Management of Car. An instruction in an action for personal injuries resulting to an occupant of an automobile from a collision with a street car which tells the jury that if the motorman "after he saw the plaintiff drive said automobile near the tracks in front of said car, before the car struck him, used such care and diligence as an ordinarily prudent and careful person would have used under the circumstances in which he was placed to slacken the speed of the car in time to avoid the collision then there was not negligence on the part of the defendant," is erroneous as being confusing and assuming that the motorman saw the automobile in the position indicated.

[1]Reported in 201 Pac. 783.

TRIAL (107)—EXCEPTIONS TO INSTRUCTIONS—MODE OF MAKING. Exceptions to instructions given need not specifically point out the errors therein, under Rem. Code, § 384, which requires only that the particular instruction or part of instruction be pointed out.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 28, 1921, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained in a collision. Reversed.

Williamson, Freeman & Broenkow and *Warren H. Lewis*, for appellant.

F. D. Oakley, for respondent.

BRIDGES, J.—This is a personal injury case. It has once before been in this court. *Reed v. Tacoma Railway & Power Co.*, 110 Wash. 334, 188 Pac. 409. The general facts are stated in that case, where the judgment of nonsuit was reversed. At the second trial, there was a verdict for the defendant, and the plaintiff has appealed from a judgment dismissing the action.

For the purpose of our discussion here, it will not be necessary to say more than that the plaintiff was in his automobile, being driven by his daughter. At about midnight they were driving northerly on that part of Yakima avenue which goes through Wright Park. That avenue intersects Division avenue, from which at this point starts North First street. The street car tracks come from the west on Division avenue, and at the general intersection leave that avenue and run northeasterly on First street. The driver of the automobile testified that she did not see the oncoming street car till she was very close to the track; that she suddenly found herself in a position of danger; that in the emergency she decided she was too close to the car track to stop, and that she concluded the best thing

to do was to attempt to get across the tracks before the street car, which was close by, could strike her; that she was unable to get across in time to avoid a collision; that the street car hit the rear portion of the automobile, and plaintiff, her father, was injured and the automobile damaged.

The appellant complains of the following instruction given by the court to the jury:

"You are further instructed that if the plaintiff's daughter thought she had time to drive upon the tracks of the defendant and off of them again, before the car of the defendant would reach her and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff's daughter, and the plaintiffs cannot recover, and your verdict must be for the defendants."

This instruction does not correctly state the law. Error of judgment is not necessarily negligence. The correct test in cases of this character is, did the person act as a reasonably prudent person would have acted under similar circumstances? The mere fact that one errs in judgment is not conclusive proof that he did not act as a reasonably prudent person would have acted under like circumstances. The driver of the automobile admitted that, in the emergency, she thought she would be safer in making an effort to get across ahead of the street car. It will not do to say that, simply because her judgment proved to be bad, she did not act as a reasonably prudent person would have acted under the circumstances. One may be mistaken as to the best course to pursue, without being guilty of negligence as a matter of law.

On page 216, Shearman & Redfield on Negligence (6th ed.), the rule is stated as follows:

"Care must be proportioned to the circumstances. In either case, the plaintiff is bound to take that de-

gree of care which persons of ordinary care and prudence are generally accustomed to use under similar circumstances, but no more. It is not enough that he should use 'his own best judgment'. That is not the proper test. Nor, on the other hand, is it always necessary 'to exercise the best judgment, or to use the wisest precaution.' "

In the case of *Berg v. City of Milwaukee,* 83 Wis. 599, 53 N. W. 890, the court said:

"In the same connection the court charged the jury, in effect, that if the plaintiff was at the time 'using his best judgment', and it turned out that in doing so he had fallen into error, that was 'not to be imputed to him as negligence'. This made the plaintiff's best judgment the standard of care which he was required at the time to exercise, instead of the well established standard fixed by the law."

In the case of *Lent v. New York Cent. & H. R. R. Co.,* 120 N. Y. 467, 24 N. E. 653, the court said:

"The test of contributory negligence or want of due care is not always found in the failure to exercise the best judgment or to use the wisest precaution. Some allowance may be made for the influences which ordinarily govern human action, and what would under some circumstances be a want of reasonable care might not be such under others."

In the case of *"The Germanic,"* 196 U. S. 589, 49 L. Ed. 610, the court said:

"But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it 'should be coextensive with the judgment of each individual' was exploded, if it needed exploding, by Chief Justice Tindal, in *Vaughan v. Menlove,* 3 Bing. N. C. 468."

The following cases support the doctrine announced: *Wolff Manufacturing Co. v. Wilson*, 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229; *McKennan v. Omaha & C. B. St. R. Co.*, 97 Neb. 281, 149 N. W. 826; 20 R. C. L. p. 26; Thompson, Negligence (vol. 2), § 1669; 29 Cyc. 521; Labatt, Master & Servant (2d ed.), page 2413. The case of *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400, although not directly in point, is so in substance.

In this connection we may discuss the following instruction requested by the appellant and refused by the court:

"I instruct you that contributory negligence is not necessarily the same as mere mistake of judgment. A person may make an error of judgment which may in some degree contribute to his injury, and he may yet be free from contributory negligence. In determining in this case whether the plaintiff's daughter was guilty of contributory negligence, the test is, whether she acted as an ordinarily careful and prudent person would have acted under all the circumstances which surrounded her at the time and place of the collision; and in this connection, you have the right to take into consideration her familiarity or lack of familiarity, if any has been shown, with the location and situation of the defendant's street car tracks and the several streets at the place of the accident. Her guilt or innocence of contributory negligence is not necessarily based upon the accuracy of her judgment."

For the most part this requested instruction correctly stated the law on the subject. But that portion of the request reading as follows was improper:

"—and in this connection, you have the right to take into consideration her familiarity or lack of familiarity, if any has been shown, with the location and situation of the defendant's street car tracks and the several streets at the place of the accident."

Familiarity or lack of familiarity by the driver of the automobile with the location could have nothing to

do with the subject. Consequently the court did not err in refusing to give the request.

Appellant also claims that the following instruction given by the court was error:

"You are further instructed that if you find from the evidence that the plaintiff's daughter was guilty of contributory negligence in driving the automobile upon the defendant's tracks, without looking for an approaching car, or otherwise using her faculties to ascertain whether or not a car was approaching, and if you further believe from the evidence that the defendant motorman in charge of said car, after he saw the said plaintiff drive said automobile near the tracks in front of the said car, before the said car struck him, used such care and diligence as an ordinarily prudent and careful person would have used under the circumstances in which he was placed to slacken the speed of the said car in time to avoid the collision, then there was not negligence on the part of the defendant, and the plaintiff cannot recover."

We have had difficulty in getting at the meaning of this instruction. If the court meant by it to lay down a rule of duty on the part of the motorman, it is too narrow, and in general conflict with other instructions wherein the duties of the motorman were properly given. If by it the court meant to give the law of last clear chance, it is not sufficiently specific. In another instruction the court properly announced the last clear chance doctrine. The instruction was also defective in assuming that the motorman "saw the plaintiff drive said automobile near the tracks, etc." Whether the motorman saw the automobile in the position indicated was for the jury. To say the best of it, this instruction was confusing and ought not to be given at another trial of the case.

Appellant complains that other of his requested instructions were not given. In so far as they correctly

stated the law, they were amply covered by instructions given.

We have not overlooked the argument of the respondent to the effect that the exceptions taken by the appellant to the instructions which we have discussed were insufficient. Its argument is that the exceptions taken do not specifically point out the error alleged to be contained in the instruction. As to the first instructions discussed by us, the exception was as follows: "The plaintiff excepts to the instruction given by the court to the jury as follows—", and then quotes the instruction. Exception taken to the second instruction discussed by us was substantially the same as above. We have no doubt that these exceptions were amply sufficient. Section 384, Rem. Code (P. C. § 7812), provides that exceptions to a charge to the jury may be taken by "specifying by numbers of paragraphs or otherwise the parts of the charge excepted to . . ." It will be observed that the statute only requires the exception to point out the particular instruction or part of instruction which it is claimed is erroneous; it does not require that the reasons or grounds for the exception be given.

In the case of *Sexton v. School District*, 9 Wash. 5, 36 Pac. 1052, it was contended that the exceptions taken were insufficient because they did not point out wherein the instructions were wrong. Referring to the statute which we have quoted, this court said:

"This act seems to provide that an exception can be taken to an instruction by simply stating to the court that the party excepts to the same and specifying the instruction excepted to, and we are constrained to hold that the exceptions in this case are sufficient."

In the case of *Harkins v. Seattle Elec. Co.*, 53 Wash. 184, 101 Pac. 836, the exception taken to the instruction stated the specific objection to it. When the case

reached this court the specific objection was waived, but other objections were urged, and we held that no objection except that which is specifically made as a part of the exceptions could be reviewed. But in that case we recognized the correctness of the rule which we have stated, for we said:

"We are not unmindful of the general rule in this state that exceptions to instructions can be properly taken by simply so stating to the court and specifying the parts excepted to without assigning reasons or grounds of exception."

In the case of *Hofreiter v. Schwabland,* 72 Wash. 314, 130 Pac. 364, concerning exceptions similar to those in this case, we said:

"The charge to the jury was in writing and the exceptions were taken 'by specifying by numbers of paragraphs . . . the parts of the charge excepted to' and were sufficient under the statute."

Counsel for respondent cites the following cases as holding to a contrary doctrine: *Shoemaker v. Bryant Lumber & Shingle Mill Co.,* 27 Wash. 637, 68 Pac. 380; *Harkins v. Seattle Elec. Co., supra; Johnson v. Seattle,* 113 Wash. 487, 194 Pac. 417. In the *Shoemaker* case *supra,* we said:

"These errors are alleged as to a number of instructions, and are general, such as 'they improperly state the law; are confusing, conflicting, misleading and present false issues not pleaded or proven'. No attempt is made to point out the respects in which they do not state the law or are confusing, etc. . . . These assignments are too general and for this reason we shall not examine them."

It does not clearly appear from the opinion that the exceptions were taken by specifying paragraphs or parts of the charge, as the statute requires, and it may be that the exceptions were general as to a large num-

ber of instructions, and for that reason the court considered the assignments too general.

We have already referred to the *Harkins* case, *supra,* and have sufficiently noticed it.

In the *Johnson* case, *supra,* we said:

"The appellant complains of certain of the instructions given by the court to the jury. To all of these, save one, we think, the exceptions were too general to apprise the trial court of the precise contention made, and that they cannot, for that reason, be reviewed in this court."

This case is not in point because it does not appear from the opinion that the exceptions were taken to particular paragraphs or parts objected to.

We desire to announce the rule that, under the statute, it is not necessary that the exceptions shall state wherein the instruction is wrong.

For the error pointed out, the judgment is reversed and the cause remanded for a new trial.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16695. Department Two. November 17, 1921.]

ALBERT BRYAN *et al., Respondents,* v. S. W. BLODGETT *et al., Appellants.*[1]

HIGHWAYS (57)—USE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained through being struck by an automobile on a public highway, the evidence sufficiently supports the court's finding of excessive speed on the part of the automobile, where it appears that the highway was paved with brick to a width of eighteen feet, but on either side was a dirt roadway; that plaintiff was hastening across the paved portion from an automobile from which he had alighted and when at a point in the highway between ten and fifteen feet from the edge of the highway pavement, was struck by a car coming from the opposite direction, which had left the paved road at a point seventy-five feet distant from the place of collision in an apparent effort to pass in front of the plaintiff.

APPEAL (418)—REVIEW—FINDINGS. Upon a close question of fact, the judgment of the trial court in a case tried without a jury is entitled to weight, and will not be set aside on appeal unless it is clear that it is not sustained by a preponderance of the evidence.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 20, 1921, upon findings in favor of the plaintiffs, in an action for personal injuries sustained through collision with an automobile. Affirmed.

Reynolds, Ballinger & Hutson, for appellants.

John W. Whitham, for respondents.

MACKINTOSH, J.—The North Trunk highway runs in a northerly direction from the city of Seattle, and is paved with brick to a width of eighteen feet. On the westerly side, in front of the residence of the respondents, the right of way is filled in with dirt to a level with the paved portion of the highway, for the full distance of thirty feet to the respondents' property line. At

[1]Reported in 201 Pac. 758.

about six o'clock on the clear evening of January 19, 1921, the respondent was taken from his place of work in the city in an automobile of one of his neighbors. When this machine reached a point opposite the respondents' residence, it was stopped on the east side of the pavement, a portion of the automobile being off the pavement. The respondent alighted from the west side and hastened across the paved portion of the roadway towards his home, and, at a point from ten to fifteen feet west of the edge of the pavement, was struck by an automobile coming from the south, which was owned and operated by the appellants. For the injuries sustained the respondent was awarded $1,500 by the court, which tried the case without a jury. From this judgment, this appeal is brought.

It is the claim of the appellants that the evidence does not establish their negligence, and that, in any event, the respondent's conduct was such as to amount to contributory negligence. The evidence indicates that the dimmers and the spot light were burning on the appellants' car, and that the respondent, when he alighted from his friend's automobile, saw the lights of the appellants' approaching car, and proceeded towards his home without anticipating that the appellant would run him down. The appellant saw the respondent in the roadway, and turned from the paved portion of the roadway in the expectation of being able to pass in front of the respondent. He says that he applied the brakes immediately and did everything possible to avert a collision. The testimony shows that the appellants' car left the pavement fifty-five feet from the place where the respondent was struck, and from the marks left in the earth it is indicated that, for this entire distance, the brakes were rigidly set. From the angle at which appellants' car left the highway it necessarily appears that the point at which the appellant

MACKINTOSH, J.—Fifth avenue, a street sixty-six feet wide, intersects Olive street, sixty-six feet wide, at about right angles; Fifth avenue running in general northwesterly and southeasterly directions. Westlake avenue, a street ninety feet wide, passes through this intersection in a general northerly direction.

The automobile collision, the subject of this action, occurred at the junction of those streets, and the appellant's negligence is satisfactorily established by the evidence. There are presented on this appeal for our consideration, objections to instructions, exceptions to the refusal to give certain requested instructions, exceptions to the failure to admit certain testimony, and objection to the amount of damages.

The appellant's taxicab was going northeasterly on Westlake avenue, and the respondent's car was going westerly on Olive street. The latter car approached Olive street's intersection with Westlake avenue prior to the time that the appellant's taxicab reached the intersection of Fifth avenue and Olive street, and had proceeded across the intersection until it was within the imaginary east line of Fifth avenue across Westlake avenue, and the evidence fairly establishes that the point of impact was well within the imaginary intersection of Fifth avenue and Olive street.

In instructing the jury in regard to the ordinances of the city of Seattle relative to the rights of drivers of vehicles approaching intersections, it is the contention of the appellant that the court should have applied those ordinances to the imaginary intersection of Fifth avenue and Olive street. Where a situation is presented, such as this, to so interpret these ordinances would lead to interminable confusion and would result, in the practical operation of automobiles, in causing rather than preventing collisions. The ordinances, among other things, provide:

"Drivers when approaching street intersections shall look out for and give right-of-way to vehicles on their right simultaneously approaching a given point."

This was interpreted in its instructions by the court as follows:

"One of those rules is that where two vehicles simultaneously approach the same intersection, the car coming from the right has a right-of-way over the other".

As we view it, this was a correct interpretation of the ordinance, and we see no merit in appellant's contention that this instruction was confusing, in that it omitted to state what intersection it was applicable to, as it applied to the common intersection of the three streets. But, in any event, the court later instructed the jury that the ordinance applied to that portion of the highway where Olive street and Fifth avenue intersect, which was an instruction more favorable to the appellant than it was entitled to.

Passing to the requested instructions, an examination of them shows that the substance of those which properly stated the law was fully and adequately expressed in the instructions given.

The error claimed as to the exclusion of testimony relates to the refusal of the court to allow the appellant to ask the driver of the taxicab, on his redirect examination, to relate an entire conversation held between him and counsel for the respondent. On cross-examination the witness had denied that he had stated to respondent's counsel, after the accident, that there was no passenger in his taxicab at the time of the collision. No part of the conversation was alluded to in the question on cross-examination. The question on redirect examination called for entirely too much, and objection was properly sustained to it. The appellant had

accepted the flat denial of the witness and there was nothing before the court which called for any explanation. There was no error in this ruling.

Objection is made to the instruction as to the rule for assessing the damages, in which the jury was told it might allow compensation for the "pain and suffering, if any, which he (plaintiff) is reasonably certain to endure in the future, if established on the trial, and in doing so you are to take into consideration the duration of such injuries, their severity, the impairment of the faculties, if any . . . ." It is objected that there was no evidence to sustain a recovery for future pain and suffering or impairment of the faculties. The record discloses, however, some evidence which the jury might take into consideration upon those points. We find no merit in the claim that the amount recovered was excessive.

The judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16643. Department Two. November 17, 1921.]

NORTH COAST POWER COMPANY, *Respondent*, v. E. V. KUYKENDALL *et al.*, *Appellants*.[1]

ELECTRICITY (1)—REGULATION OF RATES—REASONABLENESS—EVIDENCE TO SUSTAIN INCREASE—SUFFICIENCY. Where complaint is not made against a new tariff of rates by a public service corporation until after it had become effective, the burden of proof rests upon the complainant to show that the rates are unreasonable.

SAME (1)—RATES—REASONABLENESS—EVIDENCE. A tariff rate for electric power showing a net earning of 4.12 per cent on the capital invested in the service of providing power is not unreasonable, where the evidence shows the value of the service is worth its cost to the consumer.

SAME. The rule that a public service corporation may be compelled to furnish certain users service at a loss where its total business produces a fair return on the investment does not apply where there is no evidence of any adequate net earning on the entire business.

SAME. The fact that diking districts budgets for expenses of the ensuing year had been made without anticipating a raise in electric power rates would not constitute a showing of imposition of rates beyond the consumer's ability to pay, since such ability rests on their actual financial resources and not upon an appropriation of funds to meet expenses.

SAME. The question of whether rates for electric power charged by a corporation are just, fair, reasonable and sufficient is not dependent upon the facts that the consumers made contributions toward the construction of the power plant, and that the corporation solicited the business of the consumers.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered May 17, 1921, reversing on certiorari an order of the public service commission relating to power rates. Affirmed.

The Attorney General and *Raymond W. Clifford, Assistant* (*Nat U. Brown* and *McKenney & Fisk*, of counsel), for appellants.

Hayden, Langhorne & Metzger, for respondent.

[1]Reported in 201 Pac. 780.

MACKINTOSH, J.—In 1915, 1917, 1918 and 1919, the respondent, North Coast Power Company, entered into contracts with certain diking districts and diking improvement districts in Cowlitz county, Washington, to furnish electric current to the districts at rates fixed in the contracts. The respondent is a public service corporation engaged in furnishing communities along the line of the Northern Pacific Railway between Tenino and Kalama, in this state, with electric power. The diking districts are municipal corporations whose purposes are to render fit for cultivation certain lands which are subject to overflow by the Columbia river. The operation of these districts has been largely successful, and as a result there has been a great increase in the value of the lands affected by such operations. The rates fixed in the contracts were to prevail for a period of ten years.

On November 19, 1919, the respondent filed a tariff with the public service commission (now the department of public works) which tariff provided for rates largely in excess of those then in effect and provided in the contracts. This new tariff became effective on December 20, 1919. On February 14, 1920, the districts complained to the public service commission of the new rates, and upon a hearing on the complaint, it was determined by the commission that the new rates were unreasonable, and the respondent was ordered to furnish power to the districts at rates identical with those provided for in the contracts. A writ of review was taken by the respondent to the superior court, which reversed the order of the commission and held that the new tariff was effective; that the contract rates had been extinguished by the publication of the new tariff, and further held that the new tariff rates were just, fair, reasonable and sufficient, and that the rates ordered by the commission were not just, fair,

reasonable or sufficient. From that judgment, the commission (hereafter referred to as the department of public works) has taken this appeal.

This court, in the case of the *North Coast Power Co. v. Public Service Comm.*, 114 Wash. 102, 194 Pac. 587, had before it the same tariff which is the basis of this present action, and there held that the rates fixed in the tariff became effective thirty days after the filing of the tariff, and that the contracts were thus terminated, the rates provided therein becoming inapplicable. The question, therefore, here is the narrow one as to whether the rates established by the tariff filed November 19, 1919, are just, fair, reasonable and sufficient.

In the case of *State ex rel. Seattle v. Public Service Comm.*, 76 Wash. 492, 136 Pac. 850, it was determined that where a tariff had been filed by a public service corporation, and where, under § 8626-82, Rem. Code (P. C. § 5609), complaint is made before the effective date of the tariff, the burden of proof is upon the public service corporation to show that the proposed rates are just, fair, reasonable and sufficient, but that, where complaint is not made until after the new tariff had become effective, the burden of proof was shifted and the complainant is compelled to show that the tariff rates are unreasonable.

So we may start the consideration of the testimony in this case with the burden upon the districts to make showing of the unreasonableness of the tariff of November 19, 1919. The testimony establishes this situation: That the respondent is devoting to the business of these districts property which is of the value of $67,580, and this, therefore, is the amount upon which the respondent's return must be computed. It is further shown that, under the tariff filed November 19,

1919, the gross revenues of the respondent from its business with the districts for 1919 would have been $7,847.74, and that the cost of doing this business amounted to $5,063.63, making a net profit of $2,784.11, or an earning of 4.12% upon the capital in use. The testimony further shows that, under the rates provided for in the contracts (which rates were reestablished by the department's order), the gross earnings from the business done by the respondent with the districts in 1919 was $3,241.46. This, compared with the cost to the respondent of doing the business, of $5,063.63, made a loss to the company thereon of $1,822.07, or 3.70% of the capital in use.

These figures on their face must be convincing that the new rates were not exorbitant, and the profits shown thereby would not constitute an unreasonable earning, and also that the contract rates reestablished by the department were unjust, unfair and unreasonable and insufficient, and that the department was in error in setting aside the tariff of November 19, 1919, unless there are other facts which justify the establishment of unremunerative rates in this particular case. In certain cases, public service corporations may be compelled to render service at a loss. Rates should not be higher than the value of the service rendered, nor exceeding the ability of the consumer to pay. *Puget Sound Elec. R. v. Railroad Comm.*, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B 763. In this case the proof is convincing that the service is worth its cost. The testimony shows that the value of the property of the districts served has increased many fold by reason of the use of respondent's power, and that principally on account of this increase in the value of the property the districts are amply able to bear the tariff rates. The argument that the districts, being

municipal corporations and having provided for their expenses in September, 1919, without anticipating a raise in rates, no funds would be available to meet the increase is fallacious, for the reason that the measure of the districts' ability to pay is not the estimate of their managing officers, but their actual financial resources.

Another exception that in some cases compels the furnishing of service at a loss, is where the general business is making a fair return upon the total capital invested; the company may be obliged to furnish a given class with service at less than cost, but this exception does not apply here. *State ex rel. Seattle v. Public Service Comm.*, 107 Wash. 17, 180 Pac. 913; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

The case of *Puget Sound Elec. R. v. Railroad Comm., supra,* recognizes this right of certain users of public service to that service at the corporation's loss, where the total business of the corporation produces a sufficient return on the investment. In this case there is no evidence that the respondent makes any adequate net earning on its entire business.

We will now notice a few minor questions presented in this case. One of these is that the districts have made a contribution towards the construction of the respondent's plant, and that the respondent voluntarily solicited the business of the districts. The testimony shows that the figures we have hereinabove set out do not take into consideration these contributions, and the figures showing the capital investment exclude the amount donated by the districts. The question whether the rates are just, fair, reasonable and sufficient cannot be affected by the consideration of the question whether the respondent solicited the business, or whether it received it by the spontaneous offer of the districts.

It is next claimed that the power which was being furnished was surplus power. The evidence does not support this claim.

From the whole record, we are satisfied that the lower court was correct in setting aside the order of the department, which, in the circumstances, was arbitrary and capricious, and the judgment of the lower court reestablishing the rates fixed by the tariff of November 19, 1919, is hereby affirmed.

PARKER, C. J., MAIN, and HOVEY, JJ., concur.

[No. 16749. Department One. November 19, 1921.]

LONDON GUARANTY AND ACCIDENT COMPANY, LIMITED, *Appellant*, v. WESTERN SMELTING & POWER COMPANY, *Respondent*.[1]

ACCORD AND SATISFACTION (3, 9)—PART PAYMENT—EVIDENCE—INTENT OF PARTIES. Where the contract under which payment of premium upon an accident indemnity policy issued to an employer of labor was that an advance payment should be made upon the estimated pay roll, and the balance of the earned premium was to be paid when ascertained by an audit after the close of the year, the delayed payment of the advance premium until after the cancellation of the policy, and its payment in full by two checks, the latter of which was enclosed in a letter with the statement "in full payment of our account," though accepted by the insurer, did not constitute an accord and satisfaction of the amount of the earned premium, which under the contract of the parties was to be determined by an audit at the close of the year.

INTEREST (3)—COMPENSATION FOR USE—ACCEPTANCE OF CHECK. Where a check for an advance premium of insurance is accepted as in full payment, the recovery of interest for delay in payment of the account is foreclosed.

INTEREST (20)—RIGHTS AND LIABILITIES—SETTLEMENT OF ACCOUNT. Where earned premium on an indemnity insurance policy is not

[1]Reported in 201 Pac. 914.

payable until an audit of the amount due as determinable by the pay roll for the year, no interest is allowable on the amount due, in the absence of proof as to when an audit was made.

Appeal by plaintiff from a judgment of the superior court for King county, Ronald, J., entered June 11, 1921, upon findings favorable to the plaintiff, in an action on contract, tried to the court. Reversed.

Russell & Blinn, for appellant.

Ballinger, Battle, Hulbert & Shorts, for respondent.

MITCHELL, J.—The plaintiff, London Guaranty and Accident Company, Limited, a corporation, sued the defendant, Western Smelting & Power Company, a corporation, to recover the balance due on premiums for three policies of accident indemnity insurance issued to the defendant whereby it insured the defendant against liability for injuries received by the employees of the defendant in and upon certain work it was conducting and to be continued in the state of Montana. The policies were one for each year ending September 7, 1917, September 7, 1918, and September 7, 1919, respectively. The premium to be paid for each year's insurance was based, primarily, upon an estimated pay roll for the different classes of workmen covered by the insurance, which primary payment was to be made at the time of the issuance of the policy, and thereafter the full and true amount of premium on each policy was to be determined by an audit, after the close of the year, of defendant's books with reference to the amount of the different classes of work and consequent grades of hazard engaged in by defendant's employees, with the understanding that the insured would then pay whatever, if any, further amount of premium was shown to be due by such audit.

The defendant, by its answer, admitted the execution and delivery of the policies, and affirmatively plead that it had paid premiums thereon as follows: September 14, 1916, $183.70; May 14, 1917, $229.23; August 22, 1917, $60.01; December 21, 1917, $265.90; July 24, 1919, $150; October 17, 1919, $131.70, and that such payments equaled the true amount of premiums earned on the policies. The defense of payment in full was denied by the reply.

As to the first policy, the trial court found, among other things, that an advance premium payment of $183.70 was made and "that an audit of defendant's pay rolls was thereafter made, and such audit showed earned premium under said policy amounting to the sum of $515.41, leaving an unpaid balance of earned premium under said policy of $331.71." As to the second policy, the court found, among other things, that an advance premium payment of $265.90 was made and "that an audit of defendant's pay roll for the period covered by said policy showed earned premiums amounting to $768.91, no part of which has been paid except the advance premium of $265.90 paid thereon, leaving the unpaid balance of earned premium under said policy of $503.01." As to the third policy, the court made findings, among others, as follows:

"(X) That the estimate furnished this plaintiff by said defendant of its pay roll under such policy was the sum of $7,000, and the premium under said policy, based upon such estimated pay roll, was the sum of $281.70, which sum was thereafter paid to this plaintiff by said defendant.

"(XI) That the said estimated premium of $281.70 was not paid in advance, as provided by the terms of said policy, but was thereafter and after the cancellation of said policy paid by two checks, as follows: a check for $150, dated July 24, 1919, and a check for

$131.70, dated October 17, 1919. Accompanying said second check was a letter from defendant to plaintiff containing the following words:

" 'I take great pleasure in enclosing herewith cheque for $131.70, in full payment of our account'.

"(XII) That the earned premium under said policy during the time it was in force was the sum of $701.50, no part of which has been paid except the sum of $281.70, paid by said two checks as aforesaid."

Upon the findings conclusions were entered in favor of the plaintiff for the amounts found to be due on the first and second policies, together with interest thereon, altogether in the sum of $990.76; while as to the third policy, it was concluded by the trial court "that the acceptance by plaintiff of the said check of October 17, 1919, amounted to an accord and satisfaction, and plaintiff, by keeping said check, is barred from further recovery under said policy." Judgment was entered in accordance with the conclusions. Neither party took exception to any finding. The plaintiff has appealed from that portion of the judgment dismissing the action as to the third policy.

The defense of accord and satisfaction was not presented by the pleadings, but in the absence of any statement of facts showing what occurred during the course of the trial, we assume the action was tried upon that defense and denial. Both parties being content with all the findings and with the judgment entered for the appellant for the balance due on the earned premiums on the first and second policies, it follows that the so-called accord and satisfaction has been made to apply only to the premium earned on the third policy. Such was the conclusion of the trial court, as already noticed, and such is the contention of the respondent here and, with minor exceptions to be noticed later, constitutes the only question in the case.

Upon the subject of accord and satisfaction it was said in *Rogers v. Spokane,* 9 Wash. 168, 37 Pac. 300: "This is one of the most difficult branches of the law to determine, as the authorities seem to be somewhat conflicting and the circumstances under which the questions arise are so diversified and numerous." However, it seems to be settled "that the rule on this question is brought down by the modern authorities to a question of intention." *Rogers v. Spokane, supra.* Or as stated in 1 C. J. (accord and satisfaction) p. 530, § 16, "The intention of the parties, which is of course controlling, must be determined from all the circumstances attending the transaction."

From the findings it appears (a) that, at the time of the issuance of each of the three policies, an advance payment was due based upon an estimated pay roll; (b) that the full earned premium on each policy could be ascertained only by an audit after the close of the year; (c) that the advance premiums were paid upon each of the two first policies; (d) that the audit of appellant's pay roll for the periods covered by the two first policies had been made, showing a total of $990.76 due to the appellant; (e) that the balance of $990.76 was unpaid at the date of the trial, and hence necessarily unpaid on October 17, 1919, the date of the check considered as an accord and satisfaction; (f) that the advance payment called for by the estimate furnished for the third policy was $281.70, which "was not paid in advance, as provided by the terms of the policy, but was thereafter and after the cancellation of said policy paid by two checks, as follows: A check for $150, dated July 24, 1919, and a check for $131.70, dated October 17, 1919"; and (g) that the earned premium under the third policy during the time it was in force was $701.50, "no part of which has been

paid except the sum of $281.70, paid by said two checks as aforesaid." It may be further stated that the findings, as well also the pleadings, are silent as to the dates of the audits in relation to each of the three policies.

It is difficult to perceive there has been any accord and satisfaction whatever. There was no dispute between the parties nor controversy of any kind shown by the record. Respondent's letter enclosed with its check of October 17, 1919, in no way referred to the third policy by name or other designation, nor, of course, to the full earned premium thereon to be discovered by an audit of the pay roll for that year. At the date of that check there was outstanding against the respondent in favor of the appellant hundreds of dollars due above the advance premium payments on the earned premiums under the two first policies, which is now impliedly confessed by the failure of the respondent to contest the findings and judgment thereon. With that situation confronting the parties it could be contended, and, indeed, concluded with just as much show of reason, that the check and letter of October 17, 1919, constituted an accord and satisfaction of the outstanding premium debt of the two first policies, as that it did of all the claims arising under the third policy. The $150 check of July 24, 1919, and the $131.70 check of October 17, 1919, together equal the $281.70 which was the total amount due as advance premium payment under the third policy, and it is manifest that it was the intention of the one to pay, and of the other to receive, the $131.70 check in full payment of the balance due on account of the advance premium under the third policy, and not otherwise. And, indeed, such was the legal effect of the finding of the trial court that the estimated premium of $281.70

under the third policy was not paid in advance, but thereafter paid "by two checks as follows: a check for $150, dated July 24, 1919, and a check for $131.70, dated October 17, 1919." The conclusion that there was any accord and satisfaction is inconsistent with the intention of the parties as shown by the facts and circumstances surrounding the transaction, and there should have been further judgment for the appellant in the sum of $419.80—$701.50 less $281.70.

It is further claimed appellant is entitled to interest on $281.70 from the date of the third policy to July 24, 1919, when $150 was paid thereon, and then on the remainder until October 17, 1919, when the $131.70 check was given. The acceptance of the last check in full of this account foreclosed the right of this claim for interest. It is further claimed interest should be allowed on $419.80, the balance found due on the earned premium under the third policy, from May 15, 1919, the date of the cancellation of the policy. This balance of $419.80 was not due, under the terms of the policy, until the audit was had, and in the absence of any finding as to when that audit was made, no interest is allowable to date of the judgment.

Reversed, with directions to increase the judgment so as to include $419.80 on the third policy.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 16646. Department One. November 19, 1921.]

LYDIA A. GUILL *et al., Respondents,* v. K. ENOMOTO *et al., Appellants.*[1]

LANDLORD AND TENANT (139)—UNLAWFUL DETAINER—ACTIONS—PARTIES DEFENDANT. In an action by a landlord against the assignee of his tenant to compel him to vacate the premises, based on his commission of waste and on the maintenance of a nuisance thereon, the lessee of the premises is not a necessary party defendant.

SAME (129)—DEFENSES—POSSESSION AS AGENT OF LESSEE—POWER OF ATTORNEY—EVIDENCE—SUFFICIENCY. Where the owner of premises let to a Japanese refused to permit him to sublet the land to other Japanese on his departure for Japan, his placing a Japanese in possession under a general power of attorney was merely an attempt to circumvent the terms of the lease, which prohibited the leasing to, or occupancy by, any other person except by the written approbation of the lessor first obtained.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 30, 1921, in favor of the plaintiffs, in an action of unlawful detainer, tried to the court. Affirmed.

J. H. Gordon and *U. E. Harmon,* for appellants.

A. R. Titlow, for respondents.

MITCHELL, J.—This action was commenced on February 28, 1921, by Mrs. Guill and her husband, to recover from the defendants the possession of eight acres of land in Pierce county, and damages for waste committed thereon. The property is the separate estate of Mrs. Guill. The cause of action was that the occupancy of the premises was unlawful and without authority, that defendants had committed waste and engaged in the manufacture and disposal of intoxicating liquor on the premises to such an extent as to become

[1]Reported in 201 Pac. 910.

a nuisance in the neighborhood, and that written notice had been served upon the defendants to quit the premises. By their answer the defendants admitted the alleged ownership of the lands, admitted they occupied the premises, and that written notice to quit had been served upon them. They denied other material allegations of the complaint, and affirmatively alleged that the defendant K. Enomoto was lawfully in possession of the premises as the agent of one S. Yashiki, under an unexpired lease, and that the other defendants were upon the premises by employment for the purpose of assisting in the growing of berries and vegetables to which the premises were devoted. There was a general denial of the affirmative matter in the answer.

Upon the trial without a jury, in March, 1921, the court made findings and conclusions that the possession of the premises by the defendants was unlawful, that they had committed waste which, together with reasonable compensation for their occupancy of the premises, amounted to the sum of $200, and that they had committed nuisance on the premises. Judgment was entered in favor of the plaintiff for $200, that defendants vacate the premises, and that, upon the failure or refusal of the defendants to quit possession, a writ of restitution issue to dispossess them. The defendants have appealed.

The testimony shows that Mrs. Guill had given to one S. Yashiki a written lease to the premises for the term of six years from January 1, 1918, at a rental for all but the first year of $125, payable on March 1, and $125 payable on October 1 of each year, that the lessee had gone into and continued possession until September, 1920, at which time he went to Japan, from whence he has not returned. The testimony, though conflict-

ing, satisfies us, as the trial court found, that, upon going to Japan, it was the purpose of S. Yashiki, the lessee, not to return. At that time he had paid rent to January 1, 1921.

Because of the unexpired term, and because of the power of attorney from the lessee to the appellant Enomoto, of which we shall later speak, it is claimed as a first assignment of error that "the court has no jurisdiction in this case for the reason that Yashiki, the lessee, is not a party to the action." Disposing of this assignment, it is enough to notice that no relief was sought, nor has any been given, against the lessee. Both the complaint and the judgment, by their terms, run only against the defendants. It was they and not the lessee who actually occupied the land at the commencement of the action. It was they who committed the waste and who were shown to have caused and maintained a nuisance on the premises.

The remaining assignments of error relate to the findings and conclusions made by the trial court, and its refusal to sign and enter those proposed by the appellants. Upon the subject of waste and nuisance and unlawful possession of appellants, we reach the same conclusions that the trial court did. Concerning the right of the appellants to occupy the premises, reliance is had by them upon a power of attorney claimed to have been executed by S. Yashiki to K. Enomoto under a date just prior to his going to Japan. The evidence shows the premises were let to Yashiki at less than a reasonable money rental because of his personal fitness to cultivate and keep up the place. It is undisputed that, just before leaving for Japan, the lessee, saying he was going to Japan to remain indefinitely, asked and was refused leave to sublet the lands to other Japanese, and then offered to sell out to the

owner the unexpired portion of the term for $3,000, saying it could be rented to others of his countrymen at a profit over that price, and that the offer was declined. The owner was absent some months thereafter, and upon her return, found appellant Enomoto and other Japanese in possession. He asked Mrs. Guill to sublet the premises to him. She refused to do so. Still later he tried, without success, to lease the premises, offering $600, and finally $1,000 per year rental. Afterwards Enomoto mailed to her, and still later to her husband, his personal check in the sum of $125 to pay six months' rent. In each instance the check was returned to the maker. Thereafter notice to quit was served and this action commenced. During all his negotiations with the respondents, or either of them, Enomoto never referred to any power of attorney from Yashiki or that he claimed any rights thereunder. The existence of that instrument seems to have been reserved by him for the purposes of his pleading and proof, by which he contends that the original lessee is still in possession through him as agent. The power of attorney, executed in Seattle, unlimited as to time, unconfined as to territory and unrecorded, specifically enumerates a large number of things that may be done in the name of, and for the use and benefit of, the maker. It is silent, however, as to any authority to operate the berry garden or other kind of similar business. The nearest approach to any such authority is in the words "and to make, do and transact all and every kind of business of whatsoever nature and kind," immediately following the enumeration of a large number of other things altogether different from the pursuit to which these lands were devoted. These facts, with others that need not be detailed that are shown by the record, satisfy us that the power of at-

torney and the attempt to make it applicable here are nothing but subterfuge. It is an attempt to circumvent the terms of the lease whereby the lessee agreed, among other things, not to "lease or underlet, or permit any other person or persons to occupy any portion thereof, . . . but with the approbation of the lessor thereto in writing having been first obtained."

Being satisfied from the record that the appellants were in possession of the premises without any lawful authority, that they had committed and maintained a nuisance thereon as alleged in the complaint, and that the amount of damages allowed by the trial court because of waste committed, together with the value of the occupancy of the premises by the appellants, is correct, the judgment is affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 16589. Department One. November 19, 1921.]

JOHN DAVIS & COMPANY, *Appellant*, v. A. L. AABLING *et al., Respondents.*[1]

BROKERS (14)—COMPENSATION—PERFORMANCE OF CONTRACT WITHIN TIME SPECIFIED. Where a broker is employed to procure a lease of certain land on or before a certain date, and is later refused an extension of the time limit in the proposal of employment, he is not entitled to commissions if the lease is not consummated until a month and a half later than the time limit and on terms differing from the proposition.

Appeal from a judgment of the superior court for King county, French, J., entered February 21, 1921, upon findings in favor of the defendants, dismissing an action to recover a broker's commissions, tried to the court. Affirmed.

[1]Reported in 202 Pac. 2.

Carkeek, McDonald, Harris & Coryell, for appellant.

Bausman, Oldham, Bullitt & Eggerman and *Walter L. Nossaman,* for respondents.

MITCHELL, J.—This is an action brought by John Davis & Company, a corporation, to recover the sum of $5,000, claimed to be due as commission for securing a lease of real property for the defendants in accordance with the terms of a written contract. The findings of fact and judgment were against the plaintiff, which has appealed from a dismissal of the action.

Respondents desired a fifty-year lease of certain real property in Seattle. Their purpose was to demolish an old building on it and erect a new one. F. K. Struve, Mrs. Furth, and John Davis estate (not John Davis & Company, a corporation), were the owners of the property. After some preliminary negotiations with the owners or a portion of them, the respondents A. L. Aabling and J. T. Hodge, on August 13, 1919, made a written offer to F. K. Struve to lease the premises for fifty years, upon specified terms not material here other than that the "lease shall take effect and full possession shall be given on October 1, 1919," that they agreed to erect a new building on the property, and deposited with Mr. Struve $10,000, to be returned if the offer was not accepted. Thereafter, upon request, the respondents signed and delivered their commission contract in writing as follows:

"Seattle, Wash., Aug. 18, 1919.

"Messrs. John Davis & Co.,
"Seattle, Washington.

"Gentlemen:—We are negotiating for a fifty-year lease on Lots 2, 3 and 6, Block 22, of A. A. Denny's Third Addition to the city of Seattle in behalf of the Western Building Company, a corporation about to be formed.

"If this lease is made along the lines contained in our letter to Mr. F. K. Struve, dated August 13th, 1919, or on a basis satisfactory to all parties, and if the lease is executed on or before October 1st, 1919, we hereby agree to pay you a commission of $5,000, payment to be made when the Western Building Company takes possession of the above described property.

"Yours very truly,
"A. L. Aabling
"P. B. Truax
"J. T. Hodge."

Under the commission contract the appellant, which was engaged in business as real estate agents (and as such generally represented the John Davis estate that owned two-thirds of the stock of John Davis & Company, a corporation), undertook to get the John Davis estate to enter into the lease. The trustees of the John Davis estate requested the appellant to give them its opinion in writing as to the advisability of making the lease. On August 25, 1919, it complied with the request and, in writing, recommended the proposition "to the owners of the property." At a meeting of the trustees of the Davis estate on August 27, 1919, the proposition to lease was duly considered by them, whereupon it was by the trustees "resolved that F. K. Struve be instructed to have a lease prepared according to the terms set forth in the letter of A. L. Aabling and J. T. Hodge, or more favorable terms if they could be secured." (The letter referred to in the resolution was the one to Mr. Struve containing the original proposition of the respondents, as shown by the minutes of the trustees' meeting as they appeared in connection with the resolution that was adopted). Certainly this action by the Davis estate was not an acceptance of the offer made by the respondents, but only that Mr. Struve be instructed to have a lease prepared according to the offer, *or more favorable terms*

if they could be secured. It was, in effect, a commission to him to negotiate with respondents to get more favorable terms if possible.

Accordingly the owners, on August 29, 1919, made a counter proposition in writing containing material modifications and changes over the original offer of the respondents, to the disadvantage of the respondents. Thereafter the trustees of the Davis estate did nothing about the matter until the execution of the lease, other than hold a trustees' meeting on September 10, 1919, for the purpose of determining, with the other owners of the property, an apportionment of the rent under the contemplated lease and that Mr. Struve have the lease drawn showing such apportionment. Nor does it appear that the appellant did anything to consummate the deal after their letter recommending it to the Davis estate. Thereafter negotiations continued by and between Mr. Struve and the respondents which resulted in changes from time to time, so that in spite of the promptness demanded by the respondents, the final terms were not consented to until considerable time after the date fixed in the commission contract in suit. The lease as finally entered into is dated November 10, 1919, and acknowledged by the various parties from time to time thereafter down until the latter part of November, 1919. The lease as signed and delivered is much more favorable to the owners than originally proposed by the respondents, besides necessitating delay in the commencement of the new building much beyond what they had desired and intended. It satisfactorily appears that, shortly before October 1, 1919, the time limit fixed in the commission contract, the appellant, evidently being satisfied the deal could or would not be completed within the time limited in its commission contract, asked and was refused an extension of time for the performance of it.

Considerable discussion has arisen if the commission contract contemplated the procuring of a lease from all of the owners or simply the binding of the Davis estate. That feature of the controversy it appears to us is immaterial, for it is manifest that, even if confined to only the Davis estate, the commission contract, properly construed, can mean nothing less than the Davis estate should not simply consent to a lease upon the terms proposed, but that it should also be executed according to those terms, and that on or before October 1, 1919. Terms that were eventually agreeable to the Davis estate were neither consented to, nor was a lease in accordance therewith executed by it, until long after the date limit fixed in the commission contract.

Appellant has sued upon a contract it has not fulfilled. The commission offered was dependent, among other things, upon the execution of a lease on or before October 1, 1919—not on or after November 10, 1919. This provision was vital and important.

Recently, in *Swift v. Starrett, ante* p. 188, 200 Pac. 1108, we said:

"The settled rule of law is as stated in 4 R. C. L. 305: 'To entitle a broker to the payment of his commission it is essential that he prove not only the actual rendition of all the services called for by his contract of employment, but that he complete the performance thereof within the time stipulated or before the expiration of such additional period as may have been granted by the employer in extension of that originally agreed upon'."

It must be admitted that, if respondents had done anything to make it impossible for the appellant to perform within the time limited, a different rule would apply, but nothing in the record called to our attention, or that can be found upon examining it, indicates

any such conduct on the part of the respondents, or either of them. On the contrary, their interests suggested, and, indeed, they requested and demanded, the execution and delivery of the lease and the consequent right of possession of the property promptly, or on or before October 1, 1919. The delay was caused, not by their conduct, but by that of the owners of the property, who were constantly making changes more burdensome to the respondents.

Affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

[No. 16361. Department Two. November 19, 1921.]

MAZIE EARLING, *Respondent*, v. GOGSTAD EARLING, *Appellant*.[1]

DIVORCE (104) — CUSTODY OF CHILD — MODIFICATION OF DECREE — EVIDENCE — FITNESS OF PARENT. On an application for a modification of a divorce decree awarding the custody of a minor child, evidence on the subject of the competency of the mother, as custodian, relating to a period preceding the decree of divorce, is inadmissible.

SAME (104) — CUSTODY OF CHILD — MODIFICATION OF DECREE — CHANGED CONDITIONS — DISCRETION OF COURT. An order awarding the custody of a minor child to each of divorced parents for alternate periods of six months, subsequently changed on the child's becoming of school age by awarding the entire custody to the mother, should be modified, where each parent is fit and able to care for the child, to permit the father to have the custody during any substantial period when he is not in school, not exceeding six months in any one year.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 8, 1920, modifying a decree of divorce respecting the custody of a child, after a hearing before the court. Modified.

[1]Reported in 201 Pac. 908.

Frank Oleson and *Frank A. Steele*, for appellant.
Hadley & Hadley, for respondent.

Hovey, J.—This is an appeal from a supplemental decree modifying a decree of divorce heretofore rendered in an action between the parties by changing the periods of custody of the minor child of the parties.

The original decree was rendered on April 25, 1919, and awarded the child to the parties during alternate periods of six months each. The child has now become six years of age and is about to be sent to school. The parties both have their homes in the city of Seattle, but live a very considerable distance apart. A petition was filed by the respondent, alleging the fact that the child was now ready to enter school, and that he required a permanent home where he could attend school without interruption. It further alleged that, since the entry of the decree, the appellant had remarried and that his business required him to be in Alaska during a portion of the year, when he would have no permanent home in Seattle.

The evidence showed that both parties are fit, proper and able to care for this child, and the allegations of the petition, so far as we have recited same, are not disputed.

The supplemental decree awarded the entire custody to the mother, but provided that the father could have the child during the week-end of one week of each month, and such other times as might be found proper, but provided the child should not be removed from the jurisdiction of the court.

The appellant assigns three errors, the third being the action of the court in sustaining objections to evidence offered as to the competency of the respondent as custodian of the child relating to a period of time

preceding the original decree of divorce. In this ruling the court did not err.

The first and second assignments of error question the sufficiency of the facts stated in the petition and the evidence in support thereof to give the court jurisdiction in the proceeding.

In our opinion, the petition alleged a change in circumstances, namely, the attainment of school age by the child, which justified the court's considering a modification, and upon the showing made, we believe the trial judge did not abuse his discretion in awarding the entire custody of the child to the mother; but we think the father should have the custody of the child during such period of time as the child is not in school, and that the order as made should be modified to permit the father to have the custody of the child during any substantial period when he is not in school, not exceeding six months in any one year, and the decree appealed from will be modified accordingly and will stand affirmed in all other respects.

Neither party will recover costs on this appeal.

Parker, C. J., Main, Holcomb, and Mackintosh, JJ., concur.

[No. 16489. *En Banc.* November 21, 1921.]

Spokane City Club, *Respondent*, v. Union Trust Company *et al.*, *Appellants*.[1]

Mortgages (259)—Redemption—Allowances—Power to Impose Conditions on Redemptioner. Under an agreement between a mortgagee and a holder of second mortgage bonds on the same property, whereby the notes and mortgage owned by the first mortgagee were surrendered to a trust company to be held in escrow, pending purchase of the property by the second mortgage bondholder, and the first mortgage was foreclosed on demand of such bondholder and the property purchased by the trustee, the second mortgage bondholder had no right to have the amount due him included as part of the sum payable on a redemption from the foreclosure sale by a judgment creditor of the mortgagor, since such action would tend to defeat redemption from the foreclosure sale to the possible detriment of the first mortgagee.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered December 23, 1920, upon findings in favor of the plaintiff, in an action to recover an amount paid under protest on redemption from a sheriff's sale of real property, tried to the court. Affirmed.

Wakefield & Witherspoon, Wm. C. Meyer, and *Henry L. Kennan,* for appellants.

Charles P. Lund and *Frank T. Post,* for respondent.

Bridges, J.—This case involves the right of redemption from a sheriff's sale of real property. There is practically no dispute concerning the facts. Prior to March, 1911, the Spokane Club, a corporation, gave to J. P. Graves, of Spokane, its notes in the aggregate sum of $125,000, and secured the payment of them by a mortgage given to Mr. Graves, covering certain real property in Spokane. After the Spokane Club gave

[1]Reported in 201 Pac. 906.

the Graves' notes and mortgage, it gave to the Spokane & Eastern Trust Company a trust mortgage covering the same property and securing bonds issued or thereafter to be issued. The trust deed or mortgage especially recited that it was junior and subsequent to the Graves' mortgage.

Spokane Lodge, No. 228, B. P. O. Elks became the owner of $7,550 par value of the second mortgage bonds so issued. Ultimately the Spokane Club became financially embarrassed and was unable to pay the Graves' notes when they became due. The Elks lodge, being acquainted with this condition, and being desirous, if possible, of acquiring the property of the Spokane Club, entered into a written agreement with Mr. Graves, which provided that the latter would sell to the former the notes and mortgage so owned by him. The lodge was to make payments of the purchase price in various designated installments. This agreement especially provided that Mr. Graves should surrender into the possession of the Union Trust Company, of Spokane, the notes and mortgage so contracted to be sold, and that the trust company should hold such papers in escrow for the purpose of carrying out the agreement of sale and purchase between Mr. Graves and the Elks lodge. The agreement further provided that, at any time while the lodge was not in default, it might demand of the trust company that it proceed at once to a foreclosure of the mortgage. Subsequently the lodge made the demand, with the result that the trust company foreclosed the mortgage and was the purchaser at the sheriff's sale of the mortgaged lands for the sum of $132,194.77, and the sheriff issued to it his certificate of purchase, subject to redemption as provided by statute.

The Spokane City Club, a corporation, became the owner of a judgment against the Spokane Club, and

thus put itself in position to redeem from the Graves' mortgage foreclosure sale. Before the expiration of the redemption period, it notified the sheriff of Spokane county that, on a certain named date, it would redeem the property so sold. This fact was communicated by the sheriff to the Union Trust Company, which in turn notified the Elks lodge; thereupon that lodge put into the possession of the trust company the second mortgage bonds issued by the Spokane Club, and owned by the lodge, and requested that the trust company add the amount of those bonds, plus the interest thereupon, to the amount necessary to redeem from the certificate of sale held by it. The trust company then notified the sheriff that the amount necessary to be paid for the redemption was the amount which it had paid at the foreclosure sale, with interest and certain expenses, plus $10,834.32, the latter sum being the face and interest of the second mortgage bonds held by it. The sheriff refused to permit the Spokane City Club to redeem unless it paid the whole amount so demanded by the trust company, and, being unable to redeem otherwise, the Spokane City Club paid to the sheriff for redemption the amount due on the certificate of sale, plus the amount due on the second mortgage bonds held by the trust company. This last amount was paid by the Spokane City Club under protest. Although the trust company demanded that the sheriff pay it the full amount of the redemption money, he refused to pay the amount in dispute, being the amount of the face and interest of the second mortgage bonds, but did pay all the remainder of the redemption money, and held in his hands the $10,834.32. The Spokane City Club brought this action against the sheriff and the Union Trust Company to recover that sum, plus interest. There were findings,

conclusions and judgment in favor of the plaintiff, and the defendants have appealed.

Section 594, Rem. Code (P. C. §7909), reads as follows:

"Property sold subject to redemption, as above provided, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:—(1) The judgment debtor or his successor in interest, in the whole or any part of the property separately sold. (2) A creditor having a lien by judgment, decree or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in subdivision two of this section are termed redemptioners."

Section 595, Rem. Code (P. C. § 7910), provides as follows:

"The judgment debtor or his successor in interest, or any redemptioner, may redeem the property at any time within one year after the sale, on paying the amount of the bid, with interest thereon at the rate of eight per cent per annum to the time of redemption, together with the amount of any assessment or taxes which the purchaser or his successor in interest may have paid thereon after purchase, and like interest on such amount; and if the purchaser be also a creditor having a lien by judgment, decree or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest."

We are of the opinion that the judgment must be affirmed because, under the agreement between Mr. Graves and the Elks lodge making the Union Trust Company a trustee for the purposes mentioned in the agreement, that company had no right or authority to demand of the redemptioner that it pay the sum due on the bonds issued by the Spokane Club and turned over to it by the Elks lodge. The power and authority

of the Union Trust Company, as trustee, was created and limited by the agreement between the lodge and Mr. Graves. Appellants contend that the Union Trust Company held the certificate of purchase issued by the sheriff for the use and benefit of the lodge, and that Mr. Graves had no interest in the notes and mortgage held by the trust company, except he had a lien upon them to secure the unpaid purchase price, and that his rights in the notes and mortgage were those of a lien holder and nothing more. We cannot agree with this contention. It is our view that the Union Trust Company held the notes and mortgage as trustee both for the lodge and Mr. Graves. The trustee was bound to recognize the rights of Mr. Graves and its obligations to him under its trust, until such time as Mr. Graves had been fully paid by the Elks lodge. The actual title to the notes and mortgage would be held by Mr. Graves until he was fully paid, at which time the title would vest in the lodge and the trust cease to exist.

The instrument creating the trust and the trustee provided that Mr. Graves assign the notes and mortgage to the trustee for the purpose of carrying out the agreement. The lodge is to pay to the trustee for Mr. Graves a certain sum of money in installments. It further provides that, "time is of the essence of this agreement, and should the lodge at any time fail or neglect to make any payment of principal or interest as and when the same becomes due, after ten days' notice in writing of such failure, then, and in that event, it shall forfeit all rights hereunder, and Mr. Graves shall be entitled to retain all payments made by it as liquidated damages. Upon notice from Mr. Graves the trust company shall thereafter hold title to the said notes and said mortgage, or to any judgment or

decree, or whatsoever form said mortgage shall have taken, or shall hold the property representing the same, in trust, for Mr. Graves without any right, title or interest in the lodge, and upon demand from Mr. Graves it will assign, transfer or convey title thereto to Mr. Graves." But should the lodge make all the payments of the purchase price, then the trust company shall surrender such notes and mortgage to it. Mr. Graves authorizes the lodge, while it is not in default, to demand of the trustee that it foreclose such mortgage.

Under such an instrument the Union Trust Company, as trustee, was acting in the interest, not only of the lodge, but Mr. Graves as well, and, as such, it would not have any authority to do or perform any act detrimental to either the lodge or Mr. Graves, nor any act in violation of the duties imposed upon it by the trust agreement. That agreement, by its words, contemplated that the trust company might foreclose the mortgage and might buy in the property at the sheriff's sale, and that in the event of redemption the money should be paid to Mr. Graves to an amount sufficient to discharge any balance which might be owing to him from the lodge. The interests of the two parties claiming under the trust were necessarily, to some extent, inconsistent, because the whole purpose of Mr. Graves was to get his money, either directly from the lodge or indirectly by redemption, while the lodge was deeply interested in preventing a redemption because that might defeat its expressed desire to acquire the mortgaged property for its own use. If the trustee had authority by virtue of the trust agreement to add to the redemption price the $10,834.32 of the second mortgage bonds, then it would also have had authority to have added the whole amount of such

bonds outstanding, if by chance they had belonged to the Elks lodge, and in this manner the redemption might have been defeated to the possible detriment of Mr. Graves. It is therefore, our view that, when the Union Trust Company took from the lodge the second mortgage bonds and demanded payment of them as a condition for redemption, it was acting not only without authority, but in violation of its trust. The judgment is affirmed.

PARKER, C. J., MACKINTOSH, MAIN, HOLCOMB, TOLMAN, MITCHELL, and HOVEY, JJ., concur.

[No. 16614. Department Two. November 22, 1921.]

NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Respondents*, v. PUBLIC SERVICE COMMISSION *et al.*, *Respondents and Appellants*, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.*, *Respondents*.[1]

RAILROADS (9)—PHYSICAL CONNECTIONS—PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY. The question of public necessity and reasonableness of an order of the public service commission requiring a physical connection of the tracks of two railroads, made pursuant to Rem. Code, § 8626-61, is determinable by the courts by a consideration of the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier.

SAME (9). On a writ to review an order of the public service commission directing a physical connection between two railroads, it is held that the evidence fails to show a public necessity for the track connection.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered April 9, 1921,

[1]Reported in 202 Pac. 4.

reversing on certiorari an order of the public service commission. Affirmed.

The Attorney General, Raymond W. Clifford, Assistant (C. D. Cunningham, of counsel), for appellants.

Geo. T. Reid, J. W. Quick, L. B. daPonte, A. C. Spencer, W. A. Robbins, and *Thos. Balmer,* for respondents.

MAIN, J.—This was an action originally instituted before the public service commission of the state of Washington by the Centralia Commercial Club, a corporation, and was for the purpose of requiring the Northern Pacific Railway to make a physical connection between its tracks and those of the Puget Sound and Willapa Harbor Railway Company at the city of Centralia. The commission ordered the connection to be made and the cause was taken to the superior court for review, where the order of the commission was reversed and a judgment entered dismissing the proceeding. From this judgment, the public service commission appeals.

The main line track of the Northern Pacific Railway Company passes through the city of Centralia on the easterly side thereof. The Puget Sound and Willapa Harbor Railway Company, which is owned and operated by the Chicago, Milwaukee and St. Paul Railway Company, enters the city from the northwest and passes through the westerly side thereof. The distance between the two lines is approximately one mile. From the Northern Pacific main line there is a spur track extending west and crossing the tracks of the Puget Sound and Willapa Harbor Railway Company. It is at this point that it was sought to have the physical connection made. The Northern Pacific Railway Company has expended a large amount of money in

constructing terminal facilities, including industrial tracks. The industries of the city are practically all located so as to be accommodated by terminal facilities of the Northern Pacific. The terminal facilities of the Willapa Harbor road, which will be referred to as the Milwaukee, are meager, consisting of a frame station and a passing track. If the connection were made it would enable the Milwaukee to make use of the terminal facilities of the Northern Pacific. The Oregon-Washington Railway and Navigation Company and the Great Northern Railway Company by reason of contracts with the Northern Pacific use that company's line and its terminal facilities. In disposing of the case it will be assumed, but not decided, that the public service commission has the power, if public necessities and conveniences require, to order a physical connection of the tracks, even though it would result in the Milwaukee making use of the terminal facilities of the Northern Pacific upon the payment of proper compensation awarded in a proper manner. By the public service commission law, Rem. Code, § 8626-61 (P. C. § 5588), the commission is given power to order a physical connection to be made between the tracks of two roads, when the public interests and conveniences would be subserved by having track connections made.

The controlling question in the case then is whether, under the facts of the present case, the public interests and conveniences require a physical connection of the tracks of the Northern Pacific and Milwaukee. In determining whether the facts are such that a connection should be made, as stated in *Washington ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U. S. 510,

". . . the court must consider all the facts,—the places and persons interested, the volume of business to be affected, the saving in time and expense to the

shipper, as against the cost and loss to the carrier. On a consideration of such and similar facts the question of public necessity and the reasonableness of the order must be determined."

At the city of Chehalis, which is four miles to the south of Centralia, the roads here involved have joint facilities where traffic may be transferred from one road to the other. At Tacoma the roads have a physical connection of the tracks where traffic may be passed from one to the other. At points on the Milwaukee road as it extends through the state, freight can be moved by the Tacoma or Chehalis gateway at no greater charge than would apply if the interchange was made at Centralia. For competitive traffic, that is, traffic which either one or the other of the roads can handle and make delivery, if the shipper desires to move the business over the Milwaukee he will be required to pay the local rate to Tacoma or Chehalis and the Milwaukee's rate from that city to destination. As to all points which the Northern Pacific can serve and make delivery to, there would be no special advantage to the shipper in having the right to cause his freight to move over the Milwaukee. The vital point is whether, when all the facts are taken into consideration, a physical connection should be ordered in order that the shipper may cause his freight to move from Centralia to any point on the Milwaukee not served by the Northern Pacific and be relieved of the local rate from Centralia to Tacoma.

As we view the evidence, generally speaking, the order for the connection is sought for two principal reasons. One is peculiar to the Eastern Railway and Lumber Company, the plant of which is located on the Northern Pacific and is accommodated by that company's terminal facilities. The other was the belief that, if the connection was made, an adequate supply

of cars could be more easily obtained. As to the supply of cars, the evidence conclusively shows that, if the connection were made, it would not result in the shippers at Centralia obtaining any more cars than in the past when a car shortage exists. The number of cars supplied to any shipping point is a fixed quantity determined by the amount of traffic to be there accommodated. When the car shortage existed, the record does not show a complaint to the body having authority to make the allotment. The Eastern Railway and Lumber Company is engaged in the manufacture of lumber and shingles, but as to its position it appears that its log supply was being exhausted and it desired to purchase timber of the Milwaukee Land Company. That company, however, would not sell the timber unless it was specified in the contract that the products of the mill manufactured therefrom should be shipped over the Milwaukee road. The lumber company also had a contract with the Western Union for cross arms which it was required to ship over the Milwaukee. If the track connection were made, the position of the company was that it could buy the timber, manufacture it, load it upon the Milwaukee cars in the terminal facilities of the Northern Pacific and ship it over the Milwaukee road, and thus avoid a hauling expense from its mill to the line of the Milwaukee.

It seems plain to us that this presents no claim of public necessity. The rival road certainly should not be required to make the physical connection in order that the lumber company might purchase timber from the Milwaukee Land Company, manufacture it and ship it over the Milwaukee road. There were a number of other industries, representatives of which testified, two or three of whose testimonies will be briefly noticed.

The manager of the Pacific Fruit and Produce Company, among other things, testified that if there was a trackage connection between the Milwaukee and the Northern Pacific "there wouldn't be very much advantage only one could buy potatoes at times and have them shipped over the Milwaukee, whereas, as it is, we have to refuse them." Sears Brothers & Russell are engaged in the hay, grain, cement and lumber business, with a warehouse which is accommodated by the terminal facilities of the Northern Pacific. A witness testifying in behalf of this concern was not able to name any point on the Milwaukee not served by the Northern Pacific where they would be able to purchase the commodities handled by them, and could not state approximately the number of cars of freight which they would desire to ship over the Milwaukee.

There is evidence on behalf of a number of other industries, located so as to be accommodated by Northern Pacific terminal facilities, to the same general effect. The evidence fails to show with sufficient definiteness the volume of business to be affected, the saving in time and expense to the shipper as against the cost and loss to the carrier.

We conclude that the trial court was right in holding that the evidence failed to show a public necessity for the track connection.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16663. Department Two. November 22, 1921.]

L. R. MINARD *et al.*, *Respondents*, v. L. P. SCHUMAKER, *Appellant*.[1]

ANIMALS (3)—AGISTER'S LIEN—DEFENSES—FAILURE TO REDELIVER—TENDER OF AMOUNT DUE—NECESSITY. In an action to recover an agister's lien for the pasturage of horses, an answer of defendant seeking recovery for one of the horses not accounted for is subject to demurrer if it does not plead a tender of the amount due for pasturage.

JUDGMENT (65)—CONFORMITY TO PLEADINGS—AMOUNT DEMANDED—AGISTER'S LIEN—FORECLOSURE. A judgment for an agister's lien, which includes an amount due between the time of commencement of the action and the time of trial, though without the filing of a supplemental complaint, is not prejudicial where the same rate was allowed after, as before, the institution of the action.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered January 24, 1921, upon findings in favor of the plaintiffs, in an action to foreclose an agister's lien, tried to the court. Affirmed.

Gus. L. Thacker, for appellant.

A. E. Rice, for respondents.

MAIN, J.—This action was brought for the purpose of foreclosing a claimed agister's lien upon five horses. The trial resulted in findings of fact, conclusions of law and a judgment sustaining the plaintiffs' right to recover and for foreclosure of the lien. The defendant appeals.

The appellant makes two assignments of error. First, the court erred in sustaining a demurrer to the affirmative defense pleaded in the answer, and second, that the court erred in entering a judgment for the sum of $169.90, which was greater in amount than that claimed in the original complaint. As to the first, it

[1]Reported in 201 Pac. 909.

appears that, after answering the complaint by certain denials and admissions, the appellant pleaded an affirmative defense in which he sought recovery of the value of one horse which could not be produced at the time he went to the farm of the respondents for the purpose of receiving the horses. There were originally placed in the pasture six horses. While the answer sought recovery for the horse which was not accounted for, it does not plead a tender of the balance due the respondents for pasturage at the time, or at all. To this affirmative defense a demurrer was interposed and sustained. There being no allegation of tender of the amount due at the time the possession of the horses was demanded by the appellant, it was not error for the trial court to sustain a demurrer thereto. 3 Corpus Juris 39.

As to the second assignment of error, it is argued that the judgment should have been for the sum of $132.40, the amount claimed in the original complaint, instead of $169.90, the amount for which judgment was entered. Upon the trial of the cause, the question arose as to whether the respondents should recover for the pasturage of the horses after the action had begun and prior to the time of the trial, they having remained in possession of the respondents during this time. The respondents were permitted to amend the complaint so as to include the pasturage account for this period. This was objected to by the appellant, who claimed surprise and asked for a continuance of the action. No formal supplemental complaint covering the amount accruing subsequent to the institution of the action was filed. The trial court permitted a recovery for the period subsequent to the institution of the action and prior to the trial at the same rate as that allowed prior to that time. Even though no formal supplemental

complaint was filed, it is plain from the record that the appellant was not prejudiced by reason of this fact, since the recovery for the pasturage of the horses after the institution of the action was at the same rate as that prior thereto.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16300. Department One. November 22, 1921.]

UNITED STATES CAST IRON PIPE AND FOUNDRY COMPANY, *Respondent*, v. L. R. ELLIS *et al.*, *Appellants*.[1]

SALES (105)—IMPLIED WARRANTY—SUITABILITY FOR PURPOSE—CONTRACT—PERFORMANCE. When an article is manufactured for a buyer in accordance with designated specifications, or an article of a standard kind, well known to the trade, is ordered, there is no implied warranty of reasonable fitness for the intended purpose, even though the seller knows the purpose for which it is intended and it afterwards prove unsuitable therefor.

SAME (127, 133)—REMEDIES OF SELLER—ACTION FOR PRICE—DEFENSES—DEFECT IN GOODS SOLD—EVIDENCE—SUFFICIENCY. In an action to enforce a materialman's lien for cast iron water pipe furnished a public contractor, the latter is not entitled to set off the expense of replacing joints of pipe which broke after being put in place, where the evidence was not sufficient to justify the conclusion the pipe broke because of defects in manufacture, but rather raised an inference that the breaking was due to method of installation on the steel cross beams supporting it.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 6, 1920, upon findings in favor of the plaintiff, in an action to enforce a materialman's lien, tried to the court. Affirmed.

Kerr & McCord and *Stephen V. Carey*, for appellants.

Bogle, Merritt & Bogle, for respondent.

[1]Reported in 201 Pac. 900.

FULLERTON, J.—By the record in this cause, it is disclosed that the city of Seattle entered into a contract with the appellant Ellis, by the terms of which the appellant agreed to furnish the necessary piping and install for the city two certain water mains through a concrete tunnel which the city had theretofore caused to be constructed. The tunnel was some nine hundred feet in length, was circular in form, and about twelve feet in diameter. It was designed to carry mains in addition to those the appellant was required by his contract to install, and one of these, a water main forty-two inches in diameter, had then been laid on the floor of the tunnel. Above this main, steel "I-beams" had been inserted across the tunnel eight feet apart, and it was on these beams that the appellant was required to lay the mains which he undertook to install. The plans and specifications accompanying the contract prescribed the character of the work with particularity. One of the mains was to be constructed from joints of pipe twenty-four inches in diameter of a kind known as "class D. flanged cast iron pipe with plain, straight flanges," to be bolted together in a described manner, and was required to withstand when in place a water pressure of two hundred and twenty-five pounds per square inch.

The appellant purchased the pipe for the mains from the respondent. When the twenty-four-inch main was laid in the tunnel, some three of the joints of pipe broke on the application of test pressures. These breaks occurred at different tests and were separately replaced. Owing to the cramped space in which the workmen were required to work and the great weight of the joints, the work of replacing a broken joint was exceedingly difficult and costly. The appellant conceived

that the expense of replacing them was an expense for which the respondent was liable by the terms of the contract under which the pipes were purchased, and withheld from the purchase price the cost of the replacement. The respondent disclaimed liability, filed a claim of lien for the unpaid part of the purchase price against the statutory bond given by the appellant to the city, and thereupon instituted the present action to enforce the claim. The appellant sought to set off the expense he had incurred in replacing the broken joints of pipe, and on the issue of the respondent's liability for the expense so incurred, the cause was tried by the court sitting without a jury. The trial court disallowed the set-off, and entered a judgment in favor of the respondent.

The contract between the appellant and respondent is evidenced by certain telegrams and letters passing between appellant and the respondent's agent. Preparatory to bidding on the work, the appellant interviewed the agent and ascertained from him the cost at which his company could furnish the required pipe, exhibiting to the agent at that time the plans and specifications the city had prepared for the work. Later on, and after the appellant had been awarded the contract for the work, he sent to the agent a telegram ordering, with other sized pipe, "eighty-three joints twenty-four-inch flanged D" pipe, confirming the order a few days thereafter by a letter in which he gave shipping directions, and in which he stated that the pipe was "to fill the specifications of the city of Seattle for the service mains and accessories of the Lake Union tunnel." In due time the pipe was furnished by the respondent and, after inspection and such tests as could then be applied by the appellant, was installed in the pipe line. On turning on the

water after the pipe had been installed, a joint of the pipe broke when the pressure of the water reached some twenty-five pounds to the square inch. This joint was taken out and replaced by another, and the water again applied, when another joint broke at about the same pressure. This was likewise replaced and the water again applied, when another joint gave way at a somewhat increased pressure, although at a pressure much less than the pipe was required to withstand under ordinary working conditions, and, of course, at a pressure much less than the appellant guaranteed with the city that the pipe would withstand when in place.

As to the cause of the breaking of the pipe the trial court made no specific finding. It did, however, make the following findings:

"That the 24-inch cast-iron flange pipe mentioned in said telegram of defendant Ellis, which is set forth in paragraph VIII of these findings, also in said answer thereto of plaintiff, which is set forth in paragraph IX of these findings, also in said letter of defendant Ellis, which is set forth in paragraph XI of these findings and designated as Class D, was and is a standard well known and definite kind and class of cast-iron flange pipe, which was manufactured by plaintiff and by other manufacturers of cast-iron pipe, according to standard specifications for such manufacture, and the same was so designated as Class D in order to identify such pipe as being such known, described and definite article. That defendant Ellis in ordering such pipe, intended to order, and plaintiff in agreeing to fill such order, intended to supply said 83 lengths of such known, described and definite pipe.

"That no one of the said three pipes broke because of the water pressure to which it was so subjected, nor did any one of said pipes show any sign or evidence of any defect in any particular whatever. That the breaks in said pipes were each circumferential and not such as would be made by internal water pressure,

nor such as would result from said pipes being defective or too poorly made to withstand the pressure and strains which the same were expected and intended to be subjected to. That pieces were cut from two of said broken pipes, at both sides of the breaks therein, and such pieces were subjected to tensile strain tests, and each thereof tested above the requirements for material in such pipes. That each of said pipes was measured and found to be of the proper thickness.

"The court finds that none of the pipe so sold by plaintiff to defendant Ellis, on account of which said defendant claims damages against plaintiff in this action, showed any deficiency in size, thickness, quality of material, insufficiency in construction, or to any defect whatsoever, and that defendant Ellis has wholly failed to establish by the evidence in this case that any such pipe was in any manner defective or that any loss or damage sustained by him was due to or caused by any breach of plaintiff's contract with him for the sale of said pipe; and defendant Ellis wholly failed to sustain either of his affirmative defenses herein, except as to the payments for freight and gaskets credited to him as aforesaid."

As grounds for reversal of the judgment entered, the appellant makes two principal contentions; first, that in the contract under which the piping was purchased there was an implied warranty of fitness for purpose; and second, that the evidence preponderates in favor of the conclusion that the pipes were defective because of faults in their manufacture.

Noticing the first of the contentions, this court has held, and it is perhaps the general rule, that where a buyer orders a specific article from a dealer or manufacturer, stating the purpose for which the article is intended to be used, and trusts to the judgment of the seller the selection of the article which shall be suitable for the intended purpose, there is an implied warranty that the article furnished shall be reasonably fit

for the intended purpose. See *Hausken v. Hodson-Feenaughty Co.*, 109 Wash. 606, 187 Pac. 319. But the converse of the proposition is equally the rule, namely, that when the article ordered is to be manufactured according to certain prescribed specifications, or is an article well known and defined in current trade, the contract is complied with when an article is furnished which is manufactured in accordance with the designated specifications, or is an article of the standard kind known to the trade, even though the seller may know the purposes for which it is intended to be used and it afterwards proves to be unfit or unsuitable for the intended purpose. *Caldwell Bros. & Co. v. Coast Coal Co.*, 58 Wash. 461, 108 Pac. 1075; *Mianus Motor Works v. Vollans*, 83 Wash. 680, 145 Pac. 997.

It seems to us clear that the contract falls within the last rather than within the first of these rules. The order was for a stated number of joints of pipe of a kind, as the evidence disclosed and as the court found, well known in current trade by the name by which it was described. The respondent was given no right of selection. It was not permitted to question the fitness of the pipe for the purpose intended. If it filled the order at all, it was bound to furnish standard pipe of the designated kind. Plainly, we think, there could be no warranty of fitness for purpose. To so hold would be to hold that the respondent, by selling the pipe, impliedly warranted the sufficiency of the city's plans and specifications for the construction of the main.

On the second contention, we agree with the trial court that the evidence was not sufficient to justify the conclusion that the joints of pipe which broke, broke because of defects in their manufacture. On this question there was little or no direct evidence of defect in the pipes themselves. The conclusion is drawn largely from the fact that the pipes burst under

such a slight hydraulic pressure, a pressure which an engineer testifying for the appellant stated was "about what an ordinary tin can would withstand." But the nature of the breaks—the fact that they were circumferential rather than longitudinal, and the fact that they broke under such a slight pressure—seems to us to indicate that the predominating strain which caused the breaks was something other than the pressure of the water. Concerning the effect of the water pressure, one of the appellant's principal witnesses testified that a hydraulic pressure of twenty-five pounds to the square inch "would have no noticeable effect on the pipe, . . . ordinarily I would not expect such a pipe to break solely from a hydrostatic pressure of twenty-five pounds, and would feel that if it did break there might be other contributing causes." What the other contributing causes were we think the evidence plainly indicates. The pipe forming the main was of cast iron, having little or no flexibility. It was rigidly bolted together, leaving no flexibility at the joints. The beams upon which it was laid did not form a straight line, but a line with a slight vertical curve. The consensus of the testimony of the engineers is that such a mode of installation for this character of pipe was not in accord with scientific engineering, as it engendered strains which piping of this sort was not contemplated to withstand. The appellant himself testified: (We quote from the abstract.)

"The test that was made of a part of the line before it was connected up was at the suggestion of Mr. Martindale, a representative of the plaintiff. We tested the north end of the line at his suggestion; we put a flange at the break in the tunnel and then tested the north end separately to 225 to 230 pounds, and it stood that test without any leaks developing. Then we connected the south end and tested in the same

way, and it stood the test. . . . Mr. Martindale's position was something to the effect that the cause of the break was the non-flexibility of the line; that that being bolted absolutely solid was the reason for the pipe breaking. That was his position and was why he asked to test the separate ends before they were joined up solidly. We made that test and it proved satisfactory. Afterwards, when the pipe was connected up, it broke again, after I was out of there. I believe it was Mr. Martindale's contention that the reason of the three breaks was that the pipe had all been joined together so it was practically inflexible. I don't remember that he said that in his opinion if we did bolt it up again without lead sleeves to give it flexibility it would break again. I don't remember of him expressing any such opinion.

"Mr. Martindale was there about August eighth or ninth, right after the third break, and went down into the tunnel and saw the line and talked over the matter. He suggested the inflexibility of the line as the possible cause of the break, but he was, I think, as much puzzled as anybody else. His statement and conclusion was that the test he suggested would eliminate the possibility of outside causes. I don't remember that he made the statement that if it was joined up again without giving it flexibility it would break again. I would not say he did not make such a statement.

"At that time we sawed out a piece of the broken pipe for Mr. Martindale to take away and have a tensile test made. The tensile test showed, I think, the requirements for that class of pipe. They were all considered good tests. So far as those tests showed, the material of which the pipe was made was good material."

We think it unprofitable to pursue the inquiry further. In our opinion, the evidence sustains the conclusion of the trial court. The judgment will stand affirmed.

PARKER, C. J., BRIDGES, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 16394. Department Two. November 28, 1921.]

TACOMA EASTERN RAILROAD COMPANY, *Appellant*, v. PUBLIC SERVICE COMMISSION *et al.*, *Respondents*.[1]

COURTS (35)—PREVIOUS DECISIONS AS CONTROLLING—STARE DECISIS. Where the offer of a carrier to refund overcharges to shippers of lumber on the basis of a preferential rate given one shipper has been adopted as a rule by the public service commission and upheld by the courts in the case of all shippers similarly situated, the question has practically become *stare decisis*.

CARRIERS (3-1) — REGULATION — OVERCHARGES—POWERS OF PUBLIC SERVICE COMMISSION. Where a carrier has agreed that a preferential tariff on carriage of freight shall apply to other shippers of the same commodity between points named, its published tariff is in effect replaced by a lower one, and a shipper who has been compelled to pay freightage according to the published tariff is damaged to the extent of the difference between the published tariff and the preferential rate accorded other shippers (MACKINTOSH, J., dissents).

Appeal from a judgment of the superior court for Thurston county, Wilson, J., entered January 27, 1921, affirming an order of the public service commission directing the payment of overcharges to a shipper of logs. Affirmed.

F. M. Dudley, F. W. Korte, and *A. J. Laughon*, for appellant.

Ellis, Fletcher & Evans, J. E. Belcher, and *M. J. Gordon*, for respondents.

HOVEY, J.—This is an appeal from the judgment of the superior court of Thurston county affirming an order of the public service commission directing the appellant to pay to the respondent Electric Logging Company $2,772.48 overcharges on shipments of logs.

[1]Reported in 202 Pac. 1.

This is a companion case to that of *Belcher v. Tacoma Eastern R. Co.*, which has been the subject of several opinions from this court, viz: *Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 168 Pac. 782; *State ex rel. Tacoma Eastern R. Co. v. Public Service Comm.*, 112 Wash. 629, 192 Pac. 1079; *Belcher v. Tacoma Eastern R. Co., ante* p. 512, 201 Pac. 750.

The respondent Electric Logging Company paid certain freight charges to the appellant during the period of time which was held in the *Belcher* cases to come within the terms of what is known as the Calkins letter, set out in full in our opinion in *Belcher v. Tacoma Eastern R. Co., supra,* and within the order of the commission based upon that letter, also set out in that opinion. The respondent filed its claim with the public service commission on December 5, 1917, and, by stipulation of the parties, it was agreed that the amount collected from the respondent on its published tariffs in excess of the tariff fixed by it for the St. Paul & Tacoma Lumber Company is the sum for which judgment was rendered.

We are asked upon this appeal to consider anew all the questions raised in the former litigation. It seems to us that the status of this letter and the following order of the commission have become *stare decisis,* and that there is an unequivocal offer on the part of the appellant to settle with all shippers occupying the position of respondent upon the basis adopted. The commission entered its order upon this offer, granting certain privileges to the appellant and ordering it to comply with the terms of its offer.

Contention is made that the public service commission does not have jurisdiction to pass upon discriminatory charges as distinguished from overcharges. This contention was disposed of in *Belcher v. Tacoma Eastern R. Co., supra.* It is further contended that,

even if it assumes jurisdiction of discriminatory charges, the proper basis of estimating the same is not the difference between what is charged a favored shipper and the published tariffs, but the actual damage suffered. Admitting this rule in a proper case, in this case we see no distinction, for the method of settlement agreed upon and ordered was a refund to all shippers of all charges in excess of those made against the shipper with the preferential tariff. By its letter, which was adopted by the commission as the basis of the order, the appellant in effect agreed that the rates charged the St. Paul & Tacoma Lumber Company should become the tariff, during the times stated, between the points named for this commodity, and this was general as to all shippers so situated. This, in effect, replaced the published tariff with the lower one. If all shippers other than this one are to have a lower rate than the published tariff, it would seem fair to assume that the damage to this particular shipper will be the difference between the published tariff and the amount charged other shippers, and the sums awarded are merely overcharges.

The judgment of the superior court is affirmed.

The respondent Electric Logging Company will recover its costs.

PARKER, C. J., MAIN, and HOLCOMB, JJ., concur.

MACKINTOSH, J. (dissenting)—I dissent in this case for the reason that I believe that the decision of this court in the *Belcher* case is erroneous, and that there exists in the record in this case sufficient to permit of reconsideration of the entire matter, and that such a reconsideration would compel a reversal of the judgment of the superior court.

[No. 16474. Department One. November 28, 1921.]

B. F. PEARCE, *Appellant*, v. PUYALLUP & SUMNER FRUIT GROWERS' CANNING COMPANY, *Respondent*.[1]

SALES (29) — CONSTRUCTION OF CONTRACT — SUBJECT-MATTER — QUANTITY AND ASCERTAINMENT THEREOF. Where defendant offered to supply the trade with a certain kind of cabbage in carload lots and plaintiff submitted an order for five carloads, subject to confirmation, to which defendant replied "will start shipping cabbage as per your letter 13th, but may not have full five cars to supply. Will furnish as many cars as we have," which was accepted by plaintiff, there was a contract between the parties, binding only to the extent of one carload (FULLERTON, J., dissents).

SAME (156)—ACTIONS FOR BREACH—FAILURE TO DELIVER—MEASURE OF DAMAGES. On breach of a contract of sale of fifteen tons of cabbage, the measure of damages for failure to deliver is the difference between the market price on the date the cabbage should have been delivered and the market value at the time of the seller's breach.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 5, 1921, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Reversed.

Byers & Byers, for appellant.

M. F. Porter, for respondent.

BRIDGES, J.—By this action the plaintiff sought to recover damages of defendant because of its failure to ship to him three carloads of cabbages. The case was tried by the court, which made findings of fact and conclusions of law, the conclusions being to the effect that the action should be dismissed. Later a judgment was entered dismissing the action, and the plaintiff has appealed therefrom. The testimony not being before us, the question is, do the findings sustain the judg-

[1]Reported in 201 Pac. 905.

ment of dismissal. The court found that, on November 13, 1918, the respondent sent out to the trade a circular letter, reading as follows:

"We are pleased to advise that we are now receiving from our growers an excellent quality of Danish Ballhead cabbage, which we can furnish in crates at 1¼c per lb. f. o. b. Puyallup, in carloads at 1⅛c per lb. f. o. b. Puyallup. A crate holds about 160 lbs. The cabbage is firm, well trimmed, and of good quality. We can ship one crate or many carloads."

On the same day appellant submitted to respondent an offer, subject to confirmation, of

"$16 a ton crated on 5 cars of fancy, medium size, graded Danish Ballhead cabbage, of a greenish color, f. o. b. cars Puyallup, cabbage to be free from any and all diseases and frost and inside growth. First car to be shipped first of next week, the other four cars to follow, one car every 3 days . . ."

On the following day respondent, by wire, requested appellant to come to its place of business and inspect the cabbage. This the appellant refused to do, but asked for a confirmation or rejection of his order, and on December 16, the respondent wired appellant as follows:

"Will start shipping cabbage as per your letter 13th, but may not have full five cars to supply. Will furnish as many cars as we have. Believe there will be from 3 to 5, possibly more if you desire them. Trust this is satisfactory."

Appellant accepted the offer.

The theory of the trial court was that these several letters and telegrams failed to make a contract for any cabbage whatsoever. In so holding we think it was in error. We construe respondent's telegram of December 16 to mean that it obligates itself to sell and ship to appellant at least one car of the kind of cabbage ordered, and as many more, up to five in all, as it has

or can obtain from its growers. Appellant's order of the 13th was for five cars, the "first car to be shipped first of next week," and respondent agreed that it would "start shipping cabbage as per your letter of the 13th . . ." This could mean nothing else than that respondent agreed to ship the first car at the time mentioned in the order. But it did not bind itself to ship any other cars unless it had the kind of cabbage ordered, for it expressly told appellant that it "may not have full five cars to supply. Will furnish as many cars as we have." If it had more cars of cabbage which would comply with the order, then it obligated itself to ship them up to five in all. The burden was on appellant to show that respondent had cabbage of the kind ordered. Apparently he failed to make any such showing. At any rate, the findings do not indicate that respondent had any such cabbage. Such being the situation, we hold that respondent was obligated to ship but one car. Since it did not ship any, it is liable to damages for the failure to ship the one car.

The appellant's offer, which was accepted by the respondent, was sixteen dollars per ton, and that each car should contain fifteen tons. The court found that, at the time these cabbages should have been shipped, the market price was one and one-quarter cents per pound. These figures would indicate that the appellant was to pay $240 per car, and that, at the time of respondent's breach, the market value was $375, and that appellant's damage is $135.

The judgment is reversed, with instructions to the lower court to enter judgment for the appellant in the sum of $135.

PARKER, C. J., MITCHELL, and TOLMAN, JJ., concur.

FULLERTON, J. (dissenting)—The contract sued upon, as I read it, is a contract to ship to the appellant as

many car loads of cabbage as the respondent had which would comply with the appellant's specifications up to five in number, and was not a contract to ship one car load or any definite quantity. Since it does not appear that the respondent had as much as one car load of cabbage of the kind specified, it follows that it was not obligated to ship any at all.

The judgment of the trial court, in my opinion, should be affirmed.

[No. 16349. *En Banc.* November 29, 1921.]

ADA HALL, *Respondent*, v. ELMER HALL *et al.*, *Appellants*.[1]

FRAUDULENT CONVEYANCES (95, 97)—DEEDS—INTENT OF GRANTOR—WANT OF CONSIDERATION—EVIDENCE—SUFFICIENCY. A deed by a husband of all his separate property to his brother at a time when his marital relations were strained will, on granting a decree of divorce to the wife, be set aside for the purpose of awarding the wife a portion thereof, though no actual fraud on the part of the grantee is shown, where it appears the property was greatly in excess of any sum that might be due the brother; that any claim of the brother for loans was in fact outlawed; that it does not clearly appear that there was ever more than a constructive delivery of the deed; and that it was not recorded by the grantee until the expiration of a year following its execution, and but one week prior to the commencement of the divorce action (FULLERTON, HOLCOMB, and MACKINTOSH, JJ., dissent).

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered July 29, 1920, upon findings in favor of the plaintiff, in an action for divorce and to set aside a deed, tried to the court. Affirmed.

W. C. Losey, for appellants.

Oscar Cain, for respondent.

[1]Reported in 201 Pac. 912.

PARKER, C. J.—The plaintiff, Ada Hall, commenced this action in the superior court for Spokane county, seeking a decree divorcing her from her husband, the defendant Elmer Hall, and also seeking a decree setting aside a deed to certain real property, described as certain lots in Spokane county, made by him to his brother, the defendant Oliver Hall, to the end that such disposition of the property may be made in the divorce proceeding, under § 989, Rem. Code (P. C. § 7008), as shall appear just and equitable in the protection of her marital rights. A trial upon the merits resulted in a decree awarding to the plaintiff a divorce as prayed for; awarding to the plaintiff the custody of their minor child, reserving to the defendant Elmer Hall the privilege of visiting the child and having the child visit him during school vacations; setting aside the deed in question; awarding to the plaintiff, of the property described in the deed so set aside, one lot and the dwelling thereon, in which she resides with the child; awarding to the plaintiff judgment against the defendant Elmer Hall in the sum of $450, and the further sum of $150 attorney's fee, which sums are made a lien upon the other lots described in the deed so set aside; and also awarding to the plaintiff the sum of $15 per month to be paid to her by the defendant Elmer Hall for the support and maintenance of their child. From this disposition of the cause, the defendants, by the same attorney, have jointly appealed to this court.

It is first contended in appellants' behalf that the evidence does not warrant the awarding of the divorce and the custody of the child to respondent. This branch of the case does not call for the discussion of any question of law. We deem it sufficient for present purposes to say that the evidence quite convinces us that the trial judge was fully warranted in reaching

the conclusion he did upon these questions. It would be of no benefit to any one to here review the distressing story disclosed by the evidence.

It is further contended that the trial court erred in setting aside the deed in question, to the end that the lots might be disposed of in the interest of respondent as might seem just and equitable in view of her marital rights. Respondent and Elmer Hall were married in January, 1909. We may concede for present purposes that all of the lots described in the deed in question were and remained the separate property of appellant Elmer Hall since prior to his marriage to respondent. He signed and acknowledged the deed in question, purporting to convey the lots—being all of his real property—to his brother, appellant Oliver Hall, on January 10, 1919. He claims to have made this deed in payment of a debt owing by him to his brother Oliver. It seems plain from the evidence that practically all of the balance which he then may have owed his brother Oliver was so long past due as to be clearly outlawed by the statutes of limitation. We may also observe that the deed seems to have been made at a time when the relations between himself and wife were so strained as to strongly suggest an impending separation. The deed was not delivered, if at all, until some time after its execution. The deed was not recorded until January 20, 1920, a year after its signing and acknowledgment and but one week prior to the commencement of this action. The evidence, we think, warrants the conclusion that the total value of the lots was very much greater than any possible balance owing from him to his brother Oliver. While Elmer testifies that he told his brother Oliver, at Colfax, that he was going to deed the property to him, it does not appear from the evidence that his brother

agreed to accept the deed in payment of, or even as security for, any sum owing him. We have no competent evidence of the deed ever actually coming into the possession or control of Oliver, nor as to who caused it to be recorded. Elmer testified in part as follows:

" . . . when I came back (to Spokane) I executed this deed. He was not here at the time and I left it in escrow for him. I gave it to Mr. Shaefer and Peter Mertz. I left it there with them and told them if anything happened that he would be paid off for what I owed him. The deed was to be delivered to Oliver; when he got back it was to be delivered to him. The deed was put in an envelope and sealed and I gave instructions to them as my attorney and I don't know when it was delivered. I did not deliver it. I directed it to be delivered and he afterwards tried to trade the property off. I was going over to Olympia and if anything happened to me—a railroad wreck or anything—going over there, I left it there for him . . . I told him the deed was there for him and he said: 'Let it go and we will try to trade the property off.' . . . I don't know what date the deed was finally delivered. . . I don't know how long he had it. I don't think I asked him whether he had the deed or not, because he would never say a word to me or talk with me anything about our troubles."

While Oliver testified at the trial, his testimony did not in the slightest degree refer to the execution or delivery of the deed, but only was to the effect that he was willing to provide and care for his brother and the child to whatever extent their necessities might require. This testimony seems to have been given for the sole purpose of showing that the child would be provided for if awarded to Elmer, its father. Assuming, for argument's sake, that the deed was, in a legal sense, delivered to Oliver—which may well be doubted —it seems to us that the trial judge was warranted in

concluding, as he did, that Elmer Hall executed the deed with intent to deprive his wife of the opportunity of being awarded any relief as against the property described therein, in the event she should be granted a divorce from him. It also appears to us that there was no consideration for the conveyance; that is, there was no consideration to which Oliver ever assented. Viewing this record as a whole, it seems to us that the question of the setting aside of this deed is in fact much more a controversy between Elmer and his wife than between Oliver and Elmer's wife. Indeed, it seems to us that, aside from his formal answer in this case prepared by an attorney who was also Elmer's attorney, Oliver's attitude has been only passive. We are quite convinced that he has not been guilty of any actual fraud or moral wrong; but that does not argue, under these circumstances, that the deed should remain in force as the conveyance it purports to be.

The decree is affirmed.

MAIN, TOLMAN, MITCHELL, and HOVEY, JJ., concur.

BRIDGES, J. (concurring)—I concur in the result of the foregoing opinion, but think the deed should be set aside or annulled for the reason that no delivery had been made. Elmer Hall testified: "I was going over to Olympia and if anything happened to me—a railroad wreck or anything—going over there, I left it for him (Oliver Hall)." This falls far short of showing such a delivery as the law requires.

FULLERTON, J. (dissenting)—I am unable to concur in the foregoing opinion. On the question whether a divorce should be granted, the evidence, to my mind, is by no means conclusive. The evidence shows that, in the battles of words so frequently occurring be-

tween the parties, the respondent was abundantly able to hold her own, and that, in the physical combats, she usually emerged the victor. It is not shown that Elmer Hall was always, or even usually, the instigator of these combats, and if it be the rule, as I conceive it to be, that divorce is a remedy for the innocent, not the guilty, I can see no reason for granting a divorce to either party.

But passing this, there is, in my opinion, even less reason for setting the deed aside. It is shown, without contradiction, that the property conveyed by the deed was the separate property of Elmer Hall. The land itself was acquired by him prior to his marriage with the respondent, and the buildings erected thereon, although erected subsequent to the marriage, were paid for in part by money borrowed from Oliver Hall and in part from a legacy which Elmer received from an uncle. This money was loaned by Oliver to the appellant in 1912, and it seems to be assumed by the majority that this was the total advancement and total of the indebtedness owing by Elmer to Oliver. But this overlooks other parts of the record. The appellant lost an arm at the shoulder in an accident. Seemingly there was difficulty in causing the wound to heal, and Oliver bore the expense of five different surgical operations, with the accompanying costs of hospital fees, nurses' services and medicines, before a cure was effected, no part of which was ever repaid. Moreover, Oliver continuously made advancements to the parties. Indeed, the respondent in her brief says: "It is conceded that, over a period of a good many years prior to the execution of this instrument, the appellant, Elmer Hall, received considerable sums in contribution from his brother, Oliver Hall." It is shown, also, that the sum of one hundred dollars was loaned immediately preceding the execution of the deed, at which

time Elmer told his brother that he would execute a deed of the property in payment of his obligations to him. Elmer testified, also without contradiction, that the respondent knew of and consented to the execution of the deed, saying to him that she wanted Oliver paid off as she "was tired of being supported by him." It seems to me, therefore, that there is no justification for the holding that the deed was executed without consideration, or for a consideration less than the value of the property, or for a consideration barred by the statute of limitations.

Nor do I think there is any justification for the conclusion that there was no delivery of the deed. The quotation made from Elmer's testimony in the majority opinion seems to have been taken from the abstract, and to my mind does not clearly reflect his actual testimony. Reading the testimony from the transcript, it seems to me to warrant the conclusion that the escrow was but a temporary disposition of the deed—a disposition pending Oliver's absence from his home, and that it was to be delivered on his return. Certain it is that Elmer never afterwards had possession of the deed, and the instrument itself bears on its face the endorsement of the recording officer to the effect that it was recorded at the request of Oliver. Delivery is largely a question of intent, and when we have a showing of direction on the part of the grantor to deliver to the grantee, followed by a showing of subsequent possession of the deed by the grantee, there is sufficient evidence of a delivery.

As said by the majority, there is not in the evidence any showing of actual fraud or moral wrong on the part of the appellant Oliver Hall. It is said, however, that there is sufficient evidence to warrant the conclusion that Elmer Hall executed the deed with intent

to deprive his wife of the opportunity to be awarded an interest in the property. The conclusion seems to be founded on the statement, made earlier in the opinion, "that the deed seems to have been made at a time when the relations between himself (Elmer) and wife were so strained as to strongly suggest an impending separation." But I can find nothing in the record showing anything unusual in the parties' relations at that time. There was then, perhaps, bickering and quarreling between them, but, as I read the record, this was the usual rather than the unusual in their marital relation, and that nothing then occurred more than had occurred many times before and afterwards between them. It must be remembered that the parties lived together for a considerable time after the execution of the deed, and I do not find that the respondent in her testimony in support of her action for divorce lays any particular stress on the happenings at the particular time. But conceding that Elmer had a fraudulent intent, the fact does not warrant setting aside the deed. The deed was made for a valuable consideration, a part of which was a present advancement, and fraud in both grantor and grantee must be shown before that result can follow.

I cannot think, therefore, that there is any justification for the decree of the trial court.

HOLCOMB and MACKINTOSH, JJ. (dissenting in part) —We concur with Judge Fullerton as to the nullification of the deed, but agree with the majority that the remainder of the decree should be affirmed.

[No. 16571. Department Two. November 29, 1921.]

L. B. WISNER, *Respondent*, v. R. W. CARTER *et al.*, *Defendants*, CHARLES E. HOARD *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER (60)—RESCISSION BY PURCHASER—FRAUD—EVIDENCE—SUFFICIENCY. Rescission of an exchange of properties is properly decreed where the evidence shows that by collusion between one of the parties and the broker representing both parties the value of one of the properties which was situated in another county was grossly misrepresented by its owner and the broker.

SAME (74)—FRAUD—ACTION FOR RESCISSION—JUDGMENT—EXTENT OF RELIEF. In rescinding an exchange of properties on the ground of misrepresentation by one of the grantors and a broker acting jointly for both grantors, the refusal of the court to allow credit to the defendants for sums retained by the broker as commission and expense money was proper.

Appeal from a judgment of the superior court for King county, Allen, J., entered November 5, 1920, in favor of the plaintiff, in an action for rescission, tried to the court. Affirmed.

C. H. Steffen and *Andrew J. Balliet*, for appellants.

W. M. Whitney, for respondent.

HOVEY, J.—In this case the respondent, Lillie B. Wisner, sues to set aside transfers of property made between herself and the appellants, Charles E. Hoard and wife.

Respondent owned two lots, upon which were houses, located in an addition to Seattle, and which were incumbered with a mortgage of $1,800 and some mechanics' liens. The testimony varies as to their value, but both properties were disposed of shortly after the deal for a total of $4,750 on long time contracts. The appellants owned a tract of land in Pierce county

[1]Reported in 201 Pac. 918.

which was within the limits of the Camp Lewis cantonment site and which they had contracted to sell to one Hudson for $2,500, there being credited upon the contract the sum of $1,000 as initial payment, with a balance due of $1,500. R. W. Carter was a real estate agent in the city of Seattle and the principal figure in the present controversy. He and his wife were made defendants in the cause, but no relief was granted as against them. The respondent was awarded a decree under which the appellants were required to turn over to her the contracts then held by them on the Seattle property upon the payment by respondent of the sum of $1,668.30, which represented the amount of the mortgage which appellants had paid, together with the other disbursements made by them on the properties.

Carter appears to have been the agent of both parties. The Pierce county property had been listed with him about July 10, and his relations with the appellant husband appear to have been quite intimate prior to the present deal. Carter was also acquainted with the respondent and rented rooms in an apartment house operated by her. Each of the parties was anxious to dispose of their properties and Carter undertook to arrange a deal. Respondent contends that she was to receive $4,000 in cash for her properties, from which was to be deducted the mortgage of $1,800, leaving a balance of about $2,200; that Carter represented to her that the Pierce county property, which was about to be condemned, had been appraised at $2,100 or $2,200, which would insure the payment to her of the sum of $1,500 still due upon the contract for that property, and that the necessary papers to protect her on the amount coming from that property would be executed and that she

would receive the money from that source about September 1. The appellants contend that respondent was merely to take an assignment of the Pierce county contract along with a quitclaim deed, and that whatever amount she received from that source would be dependent upon what would be allowed in the condemnation suit.

The parties met on August 14 in the real estate office of Joseph E. Thomas & Company, in Seattle. The respondent executed the deed to her property and the appellant Hoard drew a check for $800. There were a number of liens against the Seattle property aside from the mortgage, which it was the duty of respondent to pay, and it was understood that these should be paid from the cash then furnished. The respondent contends that this deed was executed and delivered to Carter to be held by him in trust to protect Hoard in the payment of the cash that he was then advancing and to protect her in receiving the full amount due her. It is undisputed that at this time no papers were prepared for the transfer of the interest of appellants in the Pierce county property or the contract for the sale of the same to Hudson, and these latter papers were not executed until several days later. The deed for the Seattle property in favor of Hoard was placed of record the same date. The check first drawn by Hoard was in favor of the respondent, but it was never received or indorsed by her but was taken possession of by Carter, and the following day he went to appellants' residence, where appellant husband joined him, and they went to the bank and drew out $800 in cash, which money was turned over to Carter and the check in favor of the respondent was destroyed. The liens upon the property were paid off and Carter delivered to the respondent $229.41 on August 19. Carter claims to have given respondent a

statement at that time showing an allowance to himself of $100 commission and a balance due him in the way of overpayment of $32.31. The statement shows one item under date of August 22.

A few days after the transaction in the real estate office, the respondent discovered that the deed had been placed of record. Soon afterwards Carter presented to respondent the abstract, quitclaim deed, and assignment of contract for the Pierce county property, and, after leaving these papers in her possession for a few hours, retook the deed and assignment. The evidence does not show what became of the abstract. Respondent contends that she did not examine these papers, and it is undisputed that she never submitted them to an attorney.

It appears from the evidence that, at the time the deal was made between appellants and Hudson in July, there was a conference in the office of William Laube, an attorney in Seattle, at which time Mr. Laube, the purchaser, Hudson, and his brother all testified Carter expressly stated in the presence of the Hoards that this Pierce county property had in fact been appraised at $2,100 or $2,200 and it was just simply a matter of getting the money from the court. This part of the conversation is denied by the appellants and by Carter. It further appears in the evidence that, at an interview held in the office of Day Karr, another attorney in Seattle, some time after the deal between the parties hereto, Carter again made the same statements relative to the appraisal. It subsequently appeared that the property had not in fact been appraised at the time either deal was made, and that it was subsequently appraised at something over $500.

We have recited only so much of the testimony as we deem determinative of the case. In our opinion,

the respondent sustained her burden of proof, and it fairly appears from the testimony that there was collusion between the real estate agent, Carter, and the appellant husband to overreach the respondent, and that she was defrauded substantially as alleged, and that the judgment of the lower court was fully justified.

Appellants complain because the court, in computing the amount to be paid by respondent, refused to allow them credit for the sum of $100 Carter had retained as commission and a few dollars additional for some expense money, and a motion was made that the judgment be corrected in that respect. In our opinion, the respondent had a right to be made whole on the transaction and the court did not err in this respect.

Judgment affirmed.

PARKER, C. J., HOLCOMB, MAIN, and MACKINTOSH, JJ., concur.

[No. 16732. Department Two. November 29, 1921.]

LAURENA T. ANDRUS, *Respondent*, v. R. O. CHURCH *et al.*, *Appellants*, GENEVA JOHNSON, *Defendant*.[1]

SCHOOLS AND SCHOOL DISTRICTS (51) — TEACHERS — REMOVAL — NOTICE AND HEARING—SUFFICIENCY. The action of a board of school directors in discharging a teacher after consideration of charges against her was upon sufficient notice, assuming the necessity of notice under Rem. Code, § 4481, where she had two hearings before the board, did not dispute the facts, had agreed to resign, and had demanded no further hearing.

SAME (52)—REMOVAL—ACTION FOR DAMAGES. A school teacher who has been discharged by a board of school directors without sufficient cause has a right of action for damages for breach of contract.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered May 20,

[1]Reported in 201 Pac. 917.

1921, reversing on certiorari an order of the directors of a school district discharging a teacher from employment. Reversed.

George Acret and *R. A. Lathrop*, for appellants.
Vance & Christensen, for respondent.

HOVEY, J.—This is an appeal from the judgment of the superior court, rendered upon a writ of review, in an action wherein the respondent, Laurena T. Andrus, a school teacher, sued the appellants Church *et al.*, as directors of the school district, and the defendant, Geneva Johnson, as county superintendent of schools, seeking to review the action of the appellants in discharging the respondent when her term of school was only partly completed.

After issuing the writ and upon return thereto, the superior court heard evidence on behalf of the appellants, and at the conclusion thereof, entered a judgment holding that, because no notice had been given of the hearing upon the charges preferred against the respondent, the action of the directors was void, and that judgment set aside the orders which had been made.

Although the county superintendent had been made a party, she was dismissed from the proceeding with her costs.

The evidence introduced at the hearing showed that the respondent had been employed by the appellants for the school year commencing on the first Monday in September, 1920. The school in which the respondent was to teach employed two teachers, the respondent being the principal. Shortly after she commenced her work, the respondent got into a controversy with her fellow teacher and a pronounced feud was inaugurated

which extended to the pupils in general. The directors were drawn into the controversy and called in the defendant superintendent for advice. The respondent was called before the board and the trouble discussed with her and with the other teacher, who was also present. Matters got no better, and a second meeting was held about a month later, and at this meeting the respondent agreed that, if she could not handle the matter, she would resign. It appeared quite clearly from the testimony that the respondent was incapable of handling the situation that she then had to deal with, although she may have been successful in teaching elsewhere, that the discipline of the school was very bad, and that a situation had developed which made further operation of the school impracticable under the then conditions.

After this last meeting matters got no better, and in the month of January the directors met and came to the conclusion that the best thing to do was to discharge both teachers. They therefore saw each teacher in turn. The other teacher agreed to resign, and the respondent agreed to resign and started to write her resignation, but pleaded that she was too much upset to do it at that time and she would do it in the evening. Thereafter respondent changed her mind and refused to resign, and all parties came to Olympia and laid the matter before the state superintendent, where they were advised their proceedings were irregular. Thereafter the appellants entered a formal order discharging the respondent.

At this time the performance of the contract has been rendered impossible by the lapse of time, and we assume that the only question to be settled is the legal position of the parties whereby the right of the respondent to recover for the damages, if any, which she may have suffered by reason of the breach of her con-

tract, if such breach be found to be unlawful, may be established.

Our statute (Rem. Code, § 4481), reads as follows:

"Every board of directors, unless otherwise specially provided by law, shall have power and it shall be its duty:

"First. To employ, for not more than one year, and for sufficient cause to discharge, teachers, and to fix, alter, allow and order paid their salaries and compensation. The directors, except in districts of the first class, shall make with each teacher employed by them a written or printed contract, which shall be in conformity with the laws of this state, and every such contract shall be made in duplicate, one copy of which shall be retained by the school district clerk and the other shall be delivered to the teacher after having been approved and registered by the county superintendent as by law required. . . . ."

There is no provision in the statute for any hearing or for the procedure to be adopted by the board in case they wish to forfeit a contract, and the question now confronting us never seems to have been passed upon by this court.

In our earlier cases suits were permitted by teachers on their contracts in the courts in the first instance, the same being cited in the dissenting opinion to *Van Dyke v. School District*, 43 Wash. 235, 86 Pac. 402. In the majority opinion in that case it was held, however, that the action would not lie in the first instance in the superior court, but that appeals would have to be taken first to the county superintendent and then to the state superintendent, under the provisions of § 2318, Bal. Code. This section is now superseded by § 4707, Rem. Code, which provides that, in matters involving the construction of contracts, appeal shall be taken to the court of the proper resort.

In the case of *State ex rel. Barnard v. Board of Education,* 19 Wash. 8, 52 Pac. 317, 67 Am. St. 706, 40 L. R. A. 317, we held that, in a controversy between a teacher and a district board, a member of the board who has expressed hostility toward the teacher and has become a partisan is not qualified to sit in judgment.

In *State ex rel. Caffrey v. Superior Court,* 72 Wash. 444, 130 Pac. 747, we held that, where the county superintendent had become a partisan in a controversy, she would be disqualified to sit as the reviewing officer, and it was upon the principle of that case that the present proceeding was instituted directly in the superior court.

We come first to consider what is meant by the power of the board to dismiss "for sufficient cause." Assuming, without deciding, that notice and a hearing are necessary, we now approach the question as to what notice is necessary and as to whether the respondent had such notice as fairly apprised her of what was taking place and of the grounds of the action of the directors. In this case the respondent had two hearings before the board, and while it is true that no witnesses were called, neither side demanded them, but the question at issue was fully discussed. The respondent demanded no further hearing, and it appears from the testimony so far introduced, respondent did not dispute the facts upon which the board was acting. In her second interview, respondent so far accepted the situation as to agree to resign if conditions did not improve, and in her third interview did agree to resign, and, in our opinion, she had sufficient notice of the facts prompting the board and an opportunity to be heard if she so desired. Of course, she is not bound by the action of the board if they are proceeding contrary to the facts, and in an action upon her contract she can

recover damages, if any, if the board breached the contract without sufficient cause.

We think that the judgment entered in this cause was erroneous, and the cause will be reversed and the action dismissed.

Appellants will recover costs.

PARKER, C. J., MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 16660. Department Two. November 29, 1921.]

MARY EDDY, *Respondent*, v. SPELGER & HURLBUT, INCORPORATED, *Appellant*.[1]

NEW TRIAL (22)—GROUNDS—VERDICT CONTRARY TO EVIDENCE. A new trial was properly denied in an action for personal injuries, where there was evidence supporting plaintiff's theory of the case, although the eye-witnesses to the accident were few and the physical facts preponderate strongly in defendant's favor.

EVIDENCE (197)—OPINION EVIDENCE—BODILY APPEARANCE OR CONDITION. In an action to recover damages for being run into by a motor truck, it is error to allow a doctor, who had examined plaintiff after the accident, to testify she had been first struck at a discolored place on her back, where the evidence shows there were a number of other discolorations and bruises upon the body.

TRIAL (93)—INSTRUCTIONS—APPLICATION TO CASE—PLEADING AND PROOF. Where the acts of negligence charged in the complaint in an action for damages by a pedestrian struck by a motor truck were that the vehicle was operated at excessive speed and without giving warning, it was error for the trial court in its instruction to inject the issue of insufficient brakes, where it was nowhere raised in the pleadings or proof.

MUNICIPAL CORPORATIONS (380, 392)—STREETS—COLLISION WITH AUTO TRUCK—VIOLATION OF ORDINANCE—INSTRUCTIONS. Where an action for damages was based on the negligence of defendant in striking with a motor truck a pedestrian in the street who had alighted from a street car, it was not error for the court to refuse an instruction based on a city ordinance prohibiting pedestrians from stepping into a street at a point between street intersections.

[1]Reported in 201 Pac. 898.

SAME (381, 390)—COLLISION—VIOLATION OF ORDINANCE—RATE OF SPEED—QUESTION FOR JURY. The refusal of the court to take the issue of speed of a motor vehicle from the jury in a damage case was not error, where there was evidence that the rate of speed violated both a city ordinance limiting speed at street crossings and also a state statute (Laws 1915, p. 394, § 23) prohibiting the driving of a motor car at a greater rate than is reasonable and proper, having a regard for the traffic on the highway.

Appeal from a judgment of the superior court for King county, Hall, J., entered March 12, 1921, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Reversed.

James B. Murphy and *Ward C. Kumm*, for appellant.

Longfellow & Fitzpatrick, for respondent.

MACKINTOSH, J.—Respondent, near the corner of Second avenue and Pine street, in the city of Seattle, was run into by a delivery car belonging to the appellant.

Respondent's theory of the case is that she alighted from the front end of a north-bound Second avenue street car, which had stopped at the southerly crossing of Pine street, and had passed in front of the car and was walking on the crossing, when she was run into by the south-bound automobile of the appellant.

Paragraph eight of respondent's complaint charged:

"That said injuries to plaintiff's person were caused and produced by the carelessness of defendant and its servants and agents, and particularly in this, to wit: That said defendant, its agent and servant, negligently and carelessly ran the said auto delivery truck at the time of the accident herein mentioned at a rapid, dangerous, unlawful and excessive speed without giving warning to said plaintiff, contrary to the laws of the state of Washington and in violation of ordinance No. 39720 of the city of Seattle."

The appellant's theory of the case is that the respondent alighted from the rear end of the street car and passed around the rear end for the purpose of crossing to the west side of the street; that when she came into view of the appellant's driver, he had passed the crossing and was so close upon her that it was impossible to avoid striking her. The appellant, in its answer, pleaded certain affirmative defenses, among which was the violation by the respondent of the city ordinance regulating the rights and duties of pedestrians and motor vehicles, § 52 of the ordinance being:

"Pedestrians shall not step into that portion of the street open to moving traffic at any point between street intersections where their presence would be obscured from the vision of approaching traffic by a vehicle or other obstruction at the curb, except to board a street car, or to enter a safety zone, at right angles."

The jury returned a verdict in favor of the respondent, from which the automobile owner has appealed.

It is first urged that a motion for a new trial should have been granted by the trial court for the reason that the evidence and the physical facts preponderate so strongly in the appellant's favor that the entire evidence in the case cannot be said to support the verdict. The motion was properly denied, however, as, although the eye-witnesses to the accident were few, there was sufficient evidence supporting the plaintiff's theory of the case to entitle it to submission to the jury.

It is next urged the court was in error in allowing the doctor who had examined the respondent after the accident to testify that the respondent had been first struck at a discolored place upon her back. One of the material questions in the case for the jury to determine was the position of the respondent at the time she was struck, that is, whether she was facing the truck or

whether she had been struck by it while crossing the street and when she could not see it. The testimony showed that there were a great many discolorations and bruises upon the respondent's body and that expert opinion could not determine which one of these discolorations or bruises was made by the initial impact of the automobile. It was, therefore, error to allow the doctor, who had not been an eye-witness of the accident, to testify as to his opinion in regard to the matter. While this error may not have been sufficiently prejudicial of itself to entitle the appellant to a new trial, it was, nevertheless, error.

The next error assigned is based upon the following instruction given by the court to the jury:

"Also there was in force at the time of said collision, Section 22, Chapter 142, Laws of 1915 of the state of Washington, as follows: 'Every motor vehicle shall be provided with good and sufficient brakes and with a suitable bell, horn, or other signal, which shall be rung or blown as a signal or warning to any person or whenever there is danger of a collision or accident.' I instruct you that if you find from a fair preponderance of the evidence that the operator of defendant's auto truck violated any of the provisions of the foregoing statutes, and if such violation was the proximate cause of injury and damage to plaintiff, then said defendant would be liable for such injury or damage, unless you further find that at said time plaintiff was guilty of contributory negligence."

Referring to the eighth paragraph of appellant's complaint, which was the only one alleging the negligence which caused the injury, we find therein that the acts of negligence alleged are excessive speed and failure to give warning. The case was tried upon this theory, and nowhere, either in the pleadings or the proof, was there any evidence which went to the question of there being other than good and sufficient

brakes upon the car, and the instruction, which allowed the jury to find the appellant guilty of negligence if any violation had taken place of the provisions of the automobile law which was called to their attention, was an instruction not based upon any allegation or proof, and was, therefore, erroneous, and was so erroneous as, of necessity, must have prejudiced appellant's rights, since the evidence of the negligence charged was of a meagre and conflicting character.

The next error assigned is the refusal of the court to give an instruction advising the jury that the respondent would be guilty of negligence, as a matter of law, for having violated § 52 of the city ordinance, hereinbefore set forth. As we read that section, it has no application to the facts in this case, but it is a section referring to a pedestrian stepping from the curb to the roadway, and was not drawn for the purpose of covering cases such as the one at bar. The court did properly instruct the jury as to the effect of the violation of the other section of the ordinance which had been plead.

It is further alleged that the court erred in refusing to grant appellant's motion to take the question of speed from the consideration of the jury. This motion was properly denied, as there was evidence sufficient to go to the jury; some testimony, in fact, was given by the driver of the appellant's car himself that he was driving at the rate of twelve miles an hour, which was an unlawful rate of speed if it was the speed used at the place where the respondent claims the injury occurred, to wit, the crossing, and in addition to that, the law of this state provides, in chapter 142, Laws 1915, p. 394, § 23, that no person shall drive a car at a greater rate than is reasonable and proper, having a regard for the traffic, etc., and there is a question pre-

sented under the circumstances of the case whether the driver of the car was violating that statutory provision. Hence we find no error in the refusal of the court to take the issue of speed from the jury.

The last assignment of error is in regard to the amount of the verdict, but it is unnecessary for us to consider this question, in view of the fact that we are remanding the case for new trial.

The judgment is reversed, with instructions to grant a new trial.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16483. Department One. November 29, 1921.]

OPHIR INVESTMENT COMPANY, *Appellant*, v. ALEXANDER REALTY CORPORATION, *Respondent*.[1]

CORPORATIONS (49)—STOCK—ISSUANCE OF CERTIFICATE—PERSONS ENTITLED AND REMEDIES—CONVERSION. Where a receipt for payment of a subscription to capital stock recited the stock was "to be issued as soon as stock book has been opened," it was, in legal effect, a promise given and accepted that, as soon as the stock book was opened, a certificate would be issued, and in the absence of a demand and refusal of a certificate at any subsequent date, no action against the corporation for conversion of the stock will lie.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered December 21, 1920, upon granting a nonsuit, dismissing an action for damages for conversion of corporate stock. Affirmed.

John A. Sorley and *Grant A. Dentler*, for appellant.

Grosscup & Morrow and *Chas. A. Wallace*, for respondent.

[1]Reported in 201 Pac. 897.

MITCHELL, J.—The Alexander Realty Corporation was incorporated under articles dated January, 1919. It appears all of its capital stock of $600,000 was subscribed. It does not appear if the stock was paid up. It purchased certain real property from the Ophir Investment Company, and as a part of the purchase price therefor, signed and delivered its receipt as follows:

"Tacoma, Wash., June 18, 1919.

"Received from Ophir Investment Co. Forty-five hundred $.....Dollars in full payment for 45 shares of stock of the Alexander Realty Corporation. Certificate of stock to be issued as soon as stock book has been opened. This stock representing part of the purchase price for Lots 25 and 26, Block 505 New Tacoma.

"Alexander Realty Corporation,
"H. F. Alexander, President."

In July, 1920, the Ophir Investment Company not having received a certificate of stock in the usual form under the seal of the company and the signatures of its officers, this suit was commenced. The complaint sets out the receipt of June 18, 1919, and in paragraphs 4 and 5 it is alleged:

"That said defendant at all times since said 18th day of June, 1919, has failed, neglected and refused to cause said 45 shares of stock, or any part thereof, to be issued and delivered to said plaintiff, although demand therefor has been made upon said defendant by said plaintiff.

"That said plaintiff is damaged in the sum of $4,500, together with interest thereon at the rate of 6 per cent per annum from the 18th day of June, 1919, because of said defendant's failure, neglect and refusal to issue and deliver to said plaintiff said 45 shares of stock as aforesaid."

Judgment was demanded in the sum of $4,500, together with interest from June 18, 1919.

The answer denied that any demand was ever made for a certificate of stock, and admitted that no certificate of stock had been issued to the plaintiff. The plaintiff, in its reply to certain allegations of affirmative matter set up in the answer, admitted "that defendant has never opened stock books and that no demand has ever been made by plaintiff upon said defendant to open said stock books." It further admitted that, at the date of the final payment on the lands purchased, June 18, 1920, (about a month before the suit was brought and a year after the delivery of the receipt set out in the complaint) the plaintiff was informed by the defendant that its stock book had not been opened and that no stock certificate had been issued to any subscriber, at which last named date, or since, no demand has been made by the plaintiff for a certificate of stock. Upon the trial of the case without a jury, the court granted a motion of the defendant to dismiss the action at the close of plaintiff's case. From a judgment of dismissal, the plaintiff has appealed.

It is argued by counsel for the appellant that the respondent has refused, upon demand, to issue a certificate of forty-five shares of stock; that the refusal amounts to a conversion, thus perfecting a cause of action in damages at the election of the injured party; and that, where there is no proof of actual or market value of the stock (the case here), the value is presumptively its par value. A number of authorities is furnished in support of the contention. What may sometimes be spoken of as a refusal, upon demand, to issue a certificate of stock to one entitled to it may not necessarily amount to a conversion. But let that be as it may, the rule, if it be favored, cannot be applied in this case for the lack of facts upon which to rest it. There is no claim on the part of the appellant in either

the pleadings or proof that there has ever been any demand by it for a certificate of stock or refusal of it by the respondent, other than what occurred on June 18, 1919, at the time of the giving of the receipt in question. The account of that transaction, as testified to by the president of the appellant corporation, was that, on June 18, 1919, when he delivered the deed (evidently he meant contract for the sale of the land, because the last of the purchase price was not to be paid and deed given until June 10, 1920), to the officers of the respondent corporation, he stated that he did not consider it was proper for him to deliver it until he had the stock, and was told that he (officer of the respondent corporation) could not deliver the stock but would give a receipt—that he could not deliver the stock because the stock book had not been opened and he did not know when it would be opened. This account of what occurred was corroborated by other witnesses who were present on that occasion. It was according to that understanding the receipt was issued.

It follows, therefore, that whatever preliminary negotiations and conversations with reference to the stock may have been had on that occasion, they became merged into the written receipt that was made by one party and taken by the other. The receipt says, "certificate of stock to be issued as soon as stock book has been opened." The language, with which the appellant was content, as shown by its acceptance of the receipt, is inconsistent with the claim of a demand by the appellant for a present delivery of the certificate, and at the same time negatives the idea of a refusal on the part of the respondent to deliver the certificate, in the sense of its constituting a conversion. In this respect the legal effect of the transaction was a promise, given and accepted, that, as soon as the stock book was opened, a certificate would be issued, and, as already

stated, there is no claim of a demand or refusal at any subsequent date. There is no pleading or proof that the appellant has been refused any notice of, or denied participation in, the business affairs of the respondent, nor is there any pretense or claim of fraud in the transaction; while, by its pleading, the appellant admits that, at the time the action was commenced, the stock book had not yet been opened so as to issue stock to any subscriber or person entitled thereto.

Judgment affirmed.

PARKER, C. J., FULLERTON, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 16913. Department Two. December 1, 1921.]

THE STATE OF WASHINGTON, *on the Relation of James E. Mahoney, Plaintiff*, v. J. T. RONALD, *as Judge of the Superior Court for King County, Respondent.*[1]

CONSTITUTIONAL LAW (144)—CRIMINAL LAW (395)—APPEAL—RIGHTS OF ACCUSED—PAYMENT OF FEES OR COSTS—LIABILITY OF COUNTY. One convicted of crime upon a trial in the superior court cannot require the public treasury to defray the cost of his appeal from the judgment under Const., art. 1, § 22, defining the right of appeal and providing that "in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed," since the "final judgment" therein referred to means the judgment of the superior court.

Application filed in the supreme court November 3, 1921, for a writ of mandamus to compel the superior court for King county, Ronald, J., to supply relator a transcript on appeal. Denied.

[1]Reported in 202 Pac. 241.

Lee Johnson and *L. B. Schwellenbach*, for relator.

Malcolm Douglas, *T. H. Patterson*, and *Arthur Schramm*, for respondent.

Hovey, J.—An alternative writ of mandate was heretofore issued by this court requiring the respondent, as superior judge, to show cause why he should not be required to enter an order requiring the prosecuting attorney of King county and the court reporter in the employ of said prosecuting attorney to supply a transcript of the testimony and proceeding of the trial court in a certain cause theretofore tried in said court in which the state of Washington was plaintiff and the relator, James E. Mahoney, was the defendant.

Respondent first demurred to the petition, but, upon argument, waived any question as to whether mandamus is in fact the proper remedy rather than by writ of review.

Respondent also made return that the only transcript of the testimony which the prosecuting attorney and the reporter have is a transcript of the testimony of the witnesses supplied to the prosecuting attorney from day to day as the trial progressed and that it does not contain the entire proceedings.

It appears from the petition and the affidavit in support thereof that the relator was tried in the court presided over by the respondent judge for the crime of murder in the first degree, and that, at the conclusion of the trial, a verdict of guilty was rendered by the jury, with the special verdict that the penalty should be death. Thereafter the relator was sentenced to be hanged, and the relator gave notice of appeal to this court.

On October 21, 1921, relator duly petitioned the respondent judge for an order requiring the delivery of the testimony, the same to be without cost to the

relator, upon the ground and for the reason that the defendant is unable to pay for said transcript. It is stated in the affidavit accompanying the petition that the cost of the transcript will be approximately $1,033.

It is further stated in this proceeding that, on November 2, 1921, the respondent judge "ordered, adjudged and decreed that the petition of the defendant be and the same is hereby denied for the reason and on the ground that this court has no authority to grant the same."

Upon the argument in this court, it was stated by the prosecuting attorney that he was perfectly willing to supply all the testimony that he has to counsel for the relator if the latter will stipulate to so expedite the appeal that the same may be disposed of at the next term of this court, and it was contended by the relator's attorney that this did not allow of sufficient time to perfect his appeal.

The only legal reason advanced by the relator for the relief is § 22, of art. 1, of the constitution of this state, which reads as follows:

"In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

And it is contended that the right to appeal guaranteed to defendants under this section includes the right to require the county to defray the cost thereof where the defendant is unable to pay.

The relator cites three cases which we will discuss in order. *State ex rel. Martin v. Wofford,* 121 Mo. 61, 25 S. W. 851, is a case where the supreme court of Missouri held that a statute of that state granted this privilege to the defendant in the particular county in question. In *People v. Jones,* 34 Hun (N. Y.) 620, the general term of the supreme court of New York held, under a special statute of that state wherein that court was required to review the evidence in all capital cases if desired by the convict or his counsel, the appellate division was authorized to order the expense of the appeal to be paid by the county.

The only case cited based upon a constitutional provision is *Jeffries v. State,* 9 Okl. Cr. 573, 132 Pac. 823, being from the court of appeals of the state of Oklahoma. In that case it was held that, where the defendant had not the funds to employ counsel in the first instance, the expense of the transcript should be met by the county, under a section of the bill of rights in the constitution which reads as follows:

"The courts of justice of this state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

This provision is a general one, and if deemed sufficient to require the state not only to give a defendant every opportunity to be heard, but to go farther and furnish the funds for the purpose, it is unlike our provision, which more particularly specifies the extent of such aid.

At common law there was no right of appeal in criminal cases, and the English statute providing for suits by poor people without the payment of fees did not apply to criminal appeals. In the United States

the right of a poor person to appeal at the expense of the state is given by statute in a few states. See 17 C. J. 103, wherein this state is erroneously cited to this point. In this state we have no such statute and the right, if it exists, must come from this provision of the constitution.

In the case of *Stowe v. State,* 2 Wash. 124, 25 Pac. 1085, this court decided that the "final judgment" referred to in our constitutional provision is the judgment of the trial court and the provision preceding these words relative to the advance of money or fees refers to the judgment of the trial court, and while the right of appeal is preserved to the defendant, he is not given the right to obtain the same at the expense of the public treasury. This case was followed in *State ex rel. Langhorne v. Superior Court,* 32 Wash. 80, 72 Pac. 1027, and has never been overruled.

Relator cites *State ex rel. Coella v. Fenimore,* 2 Wash. 370, 26 Pac. 807, wherein the clerk of the court was required to supply a transcript of the record to a defendant who was unable to pay the fee. No authority is cited to support this decision and it evidently was not intended to overrule the doctrine of *Stowe v. State, supra,* as this court in the subsequent case of *State ex rel. Coella v. Fenimore, supra,* followed the first case. In our opinion, the reasoning of Judge Dunbar in the first case is logical and conclusive and we adhere to the law as pronounced in that case.

The writ prayed for will be denied and the proceeding dismissed.

Parker, C. J., Main, Holcomb, and Bridges, JJ., concur.

[No. 16546. Department Two. December 2, 1921.]

Percy Parks *et al., Respondents,* v. Samuel Newcomer *et al., Appellants.*[1]

Boundaries (13)—Location of Line—Evidence—Sufficiency. In an action to establish a boundary line between city lots, evidence that a line across the street had been established with reference to the disputed line while the latter was marked by a fence, though admissible, was not conclusive upon the question of the true line.

Same (12)—Evidence—Admissibility. In fixing the boundary between two city lots under a plat made more than thirty years prior to the action, the corner stakes of which were lost, the court may properly take into consideration the question whether there is enough ground left in the block to fill out the full quota of lots, under the assumption that when the block was platted sufficient ground existed for each lot as platted.

Appeal from a judgment of the superior court for King county, Hall, J., entered February 24, 1920, upon findings in favor of the plaintiffs, in an action to establish a boundary line, tried to the court. Affirmed.

Geo. McKay, for appellants.

Carroll Hendron, for respondents.

Hovey, J.—The respondents sued the appellants to establish a lost boundary line between the city lots owned by the respective parties.

Appellants first contend that the complaint is demurrable because it seems to embrace an action for the recovery of the possession of the property, and objection is further made to certain evidence because it is claimed it was not limited to that form of action.

As we view the proceeding, it was brought and tried under the provisions of § 947 *et seq.,* Rem. Code (P. C. § 7412). The court first heard evidence and concluded therefrom that the east end of the disputed line was

[1]Reported in 202 Pac. 244.

established, and appointed a civil engineer as commissioner to establish the whole line. This the commissioner did with reference to the lines of certain streets, and the court entered judgment establishing the line as reported. Appellants offered evidence to the effect that a line across the street had been established with reference to the line in dispute while the latter line was marked by a fence, and complain that the court did not accept this evidence as overturning the other evidence in the case. While this evidence was admissible, we do not consider it conclusive. Evidence was introduced showing that the appellants were securing under the line as contended for by respondents the entire amount of ground which they claimed to own and upon which they paid local assessment charges, and the south boundary line of appellants' land was also inquired into in this connection, and appellants object that this evidence should not be considered. This land was platted in the year 1888 and it is quite natural that most of the corner stakes would be lost, and we think it would be proper for the court in fixing the boundary between two lots to take into consideration the question whether there is enough ground left in the block to fill out the full quota of lots, as it is fair to assume that, when the block was platted, sufficient ground existed for each lot as platted.

We are satisfied that the testimony supports the judgment of the trial court and it is affirmed.

The respondents will recover their costs.

Parker, C. J., Main, Holcomb, and Mackintosh, JJ., concur.

[No. 16619. Department Two. December 2, 1921.]

J. R. ELLISON *et al.*, *Respondents*, v. J. E. KEITH *et al.*, *Appellants*.[1]

SUBSCRIPTIONS (3) — CONTRACT — LIABILITY — RIGHT TO RESCIND AGREEMENT. Subscribers to a Chautauqua course of entertainment to be given in their town as part of a circuit have no right to revoke the contract, since the contract in suit, with like contracts, forms the consideration for the overhead cost of the undertaking and the expense of employing lecturers and entertainers for the course.

Appeal from a judgment of the superior court for Clarke county, Blake, J., entered November 17, 1920, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Crass & Hardin, for appellants.

Geo. W. Gearhart, for respondents.

HOVEY, J.—In this case the respondents, who operate a chautauqua, sued the appellants as subscribers to a contract by the terms of which appellants agreed to take a certain number of tickets for an indoor chautauqua to be held at Ridgefield, in this state, in the season of 1917. The contract is dated March 22, 1917.

On August 7, 1917, the appellants signed a written revocation of this agreement and the same was received by the respondents within a few days thereafter.

The contract in question is one of eighty-seven similar contracts obtained by the respondents for that season in as many different towns and cities. Prior to this notice of revocation, the respondents secured the services and had under contract various individuals to give the performances contemplated for the entire season and had made considerable outlays for

[1]Reported in 202 Pac. 241.

advertising matter, and had also been to the expense of securing the contracts for the performances in the various places. After the receipt of this notice from the appellants, respondents went ahead with their part of the contract and tendered performance during the month of November of the same year.

The trial court gave judgment in favor of the respondents and against the appellants for the full amount called for by the contract.

Appellants contend that this is a subscription contract and that they had the right to rescind it at any time before the money was spent in the performance of it, and that, in this case, the contract could be revoked in August without causing any injury to the respondents, and cited in support of their contentions 9 Cyc. 323; 37 Cyc. 486. Appellants also cite *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 696; *Young Men's Christian Ass'n v. Olds Co.*, 84 Wash. 630, 147 Pac. 406; *Depauw University v. Ankeny*, 97 Wash. 451, 166 Pac. 1148, which are all cases in which subscription contracts were sustained, for the purpose of distinguishing them from the present case. It is doubtful if the present case is that of a subscription contract, as the consideration to be received was tickets for which the purchasers were presumed to receive a value in the way of intellectual stimulation or entertainment, and while the subscribers would each need only one ticket, yet they had it in their power to pass on this privilege to other persons who would receive a like service, and to collect a compensation therefor.

But, in our opinion, even viewed as a subscription contract, the appellants are in error in treating this contract as involving Ridgefield alone. This contract and the eighty-six other contracts obtained were the basis for the action of the respondents in securing the services of all of its entertainers and lecturers, in in-

curring its overhead expense and procuring its advertising matter, and if one set of subscribers may rescind, so may several or all, and the mere fact that this is only a fractional part of the money which was to be received would not relieve the transaction from applying the ordinary rules relative to a contract.

On the case as made out and the contentions made by the appellants, we think the respondents are entitled to recover, and the judgment appealed from is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and BRIDGES, JJ., concur.

[No. 16255. *En Banc.* December 5, 1921.]

E. C. FINCH, *Appellant*, v. A. P. SPRAGUE *et al.*, *Respondents.*[1]

VENDOR AND PURCHASER (53)—RESCISSION BY VENDOR—ELECTION TO RESCIND AND NOTICE. Under a contract for the sale of land, which provided that there should be no forfeiture unless ten days' notice were given the purchaser, a failure to give such notice and the giving instead one abrogating the contract, entitled the purchaser to rescind and sue for damages.

SAME (86)—CONTRACT—PERFORMANCE—TITLE OF VENDOR—WAIVER OF DEFECTS AND OBJECTIONS. A vendor may contract to sell land he does not own, it being incumbent on him to have title at the contractual date of delivery, and knowledge by purchaser of the vendor's want of title does not constitute either waiver or acquiescence.

SAME (94)—PERFORMANCE OF CONTRACT—PAYMENT OF PURCHASE MONEY—TENDER. Failure of a purchaser under a contract for the conveyance of land to tender the price or offer to perform on the date stipulated for performance would not place him in default, where he has knowledge the vendor is not in a position to convey the lands.

SAME (161)—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY—PARTIAL FAILURE OF TITLE—RESCISSION. Where a contract for the conveyance of land has been rescinded by the vendor, the

[1]Reported in 202 Pac. 257.

purchaser is entitled to abandon the contract and recover the portion of the purchase price paid thereon.

SAME (171)—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY—DEFENSES—TENDER OF PERFORMANCE. Where a vendor, under a contract to convey, has declared a forfeiture or renunciation of the contract, and the purchaser has relied thereon and begun an action for damages, the vendor cannot reinstate the contract by an offer to perform.

SAME (64)—RESCISSION BY PURCHASER—ESTOPPEL OR WAIVER. An allegation in a complaint by a purchaser for damages for failure of a vendor to perform a contract to convey that he "would now be willing to perform his contract but for the fact the defendants have placed it out of their power to perform," would not constitute a waiver of his right to rescind.

SAME (182)—REMEDIES OF PURCHASER—BREACH OF CONTRACT—DAMAGES. In an action for damages for failure to convey a quantity of land, recovery is limited to a return of the money paid, with legal interest, in the absence of evidence sufficient to show damages by way of loss of sales and contemplated profits.

TOLMAN, MACKINTOSH, and BRIDGES, JJ., dissent.

Appeal from a judgment of the superior court for Grays Harbor county, Reynolds, J., entered July 27, 1920, upon findings in favor of the defendants, in an action on contract, tried to the court. Reversed.

E. E. Boner and *Stephen J. Chadwick*, for appellant.

Theodore B. Bruener and *W. H. Abel*, for respondents.

HOLCOMB, J.—Appellant brought this action to recover damages in the sum of $14,600, with interest and costs, for the breach of a contract for the purchase of land.

On May 26, 1919, appellant entered into an optional contract whereby he undertook to purchase, and respondents agreed to sell, 920 acres of land, for a consideration of $36,800; $1,600 was paid on the execution of the contract; $1,000 on June 10, 1919, and $2,000 on June 20, 1919, as specified in the contract. On the next

day or so after the execution of the contract, respondent came to appellant and told him that he had included land in the contract to which he had no title; that he would undertake to arrange for the purchase of this land by another, one Davenport, so that he could, as he puts it, "eventually comply with his contract to the letter." The Finch-Sprague contract provided for the final payment of $32,200 on or before December 1, 1919. Time was not of the essence of the contract, but it was provided in the contract that there should be no forfeiture unless ten days' notice were given to Finch.

Sprague entered into a contract with Davenport for the purchase of the 520 acres of land not owned by Sprague, but which was included in his contract with appellant, which provided that the final payment should be made on December 1, 1919, and, by self-executing provisions, the contract would terminate if not performed on or before that date. The various payments made by appellant totaled $4,600, leaving no payment but the final payment due December 1, 1919.

Appellant did not make or tender the final payment on December 1, 1919, and on December 26, 1919, respondent notified appellant by letter as follows:

Carlisle, Wash., December 26, 1919.

"Mr. Edward C. Finch,

"Aberdeen, Wash.

"Dear Sir: As we have heard nothing from you to date in this matter of the contract we entered into of May 28, 1919, we hereby notify you, as per agreement, that this contract is now null and void, and that no longer will be considered.

"Will you kindly leave the abstracts with Mr. Bruener, also as per your offer, please sign some sort of quit claim so as to clear the record in the matter. Mr. Bruener, will make out such papers any time you will call on him.

"Thanking you for your attention to same and regretting that our first deal did not terminate to our mutual satisfaction.

"Yours truly,
"A. P. SPRAGUE."

This letter was addressed and sent by registered mail to Finch at Aberdeen, Washington, and forwarded by the postal authorities to him at Roundup, Montana, where it was received by him on or about December 30, 1919. Immediately upon its receipt Finch returned it to his attorney at Aberdeen, with instructions to protect his interests, and the complaint in the present suit was verified on January 3, and service made on respondents on January 5, 1920.

The trial court made findings and conclusions in favor of respondents, and judgment was entered accordingly.

Respondent contends that the above notice was in accordance with the contract and contemplated a compliance by appellant within the ten-day period, but we think it went further and was an absolute abrogation of the contract when, by its terms, it was still in effect, as appellant had at least ten days after notice within which to perform. This notice was never given.

At the time of giving the notice on December 26, 1919, respondents had not the power to convey the title contracted to be conveyed to appellant. Five hundred twenty acres of the land did not belong to respondents. True, they had contracted with Davenport to obtain the same, but at the same time contracted that title should pass only upon final payment of the purchase price on or before December 1, 1919, with self-executing provisions of the contract so that, if not fully performed at that date, it would terminate. It is true Sprague was not bound to have any title at the time

he made the contract. A vendor may contract to sell something he does not yet own. *Webb v. Stephenson,* 11 Wash. 342, 39 Pac. 952; *Morris v. Columbia Canal Co.,* 75 Wash. 483, 135 Pac. 238; and it is urged on the part of respondents that, when Finch was informed that Sprague did not have title to a portion of the land in controversy, and later informed that Sprague had procured a contract from Davenport for the 520 acres of land not owned by respondents, appellant acquiesced therein, and is therefore estopped to claim any breach of the contract on the part of respondents.

Although the trial court so found and concluded, we can find no evidence of acquiescence on the part of the appellant in the contract with Davenport, nor of any waiver on the part of appellant as to the failure of title on the part of respondents to the 520 acres of land. While it is true that appellant continued his efforts to make sale of all of the lands which he had under option, which Sprague had contracted to convey, he had a right to presume that Sprague would acquire title to the land which he had contracted to convey to appellant so as to be ready to perform his contract when the time came. It was not exigent upon him to require title to be in respondents prior to December 1, 1919, nor to object to its then status. This conduct on the part of appellant was only such conduct as he had a right to pursue under his option. It did not constitute either waiver or acquiescence. Furthermore Davenport, with whom Sprague contracted for the remainder of the land, testified that appellant did not accept or agree to the Davenport contract with Sprague, but asked Davenport to make a contract direct to appellant for the remainder of the land, which was refused. And when the contract with Sprague had about reached its period of maturity, or

in November, 1919, appellant went to respondent and asked for an extension of time, which was tentatively agreed to, provided Davenport would give Sprague an extension of time on his contract. This was refused by Davenport. Consequently, when December 1, 1919, arrived, Sprague had no title to the greater portion of the land, and after that date had no power to compel the conveyance thereof from Davenport. Of this appellant was well aware, and when the respondents gave him the notice of December 26, 1919, both were well aware that it was entirely out of the power of respondents to convey to him the lands that had been contracted to be conveyed. He therefore immediately began his action for damages for breach of the contract.

Since the vendor, to the knowledge of the vendee, was not in position to convey the lands, a tender or offer to perform on appellant's part would have been a useless ceremony, and his failure to make such tender cannot be made the basis of any relief on behalf of respondents on the theory that appellant was in default. *Lawson v. Sprague,* 51 Wash. 286, 98 Pac. 737.

"If a vendor agrees to convey title at a given time, and has no title when the date for performance arrives, the question of a reasonable time for preparing a deed does not enter into the case. There is a breach of the agreement to convey for which the purchaser may at once rescind." *Walsh v. Colvin,* 53 Wash. 309, 101 Pac. 1085.

Appellant did not rescind when the day for performance arrived, but respondents afterwards did, and appellant at once treated the contract as rescinded on respondents' part, as he had a right to do. *Maffet v. Oregon & Cal. R. Co.,* 46 Ore. 443, 80 Pac. 489; *Croup v. Humboldt Quartz & Placer Mining Co.,* 87 Wash. 248, 151 Pac. 493, L. R. A. 1918A 537.

In the above cited Oregon case it was held that,

"Treating the defendant's declaration that the contract is cancelled, and no longer of any force or effect, as an abandonment, the plaintiff might himself abandon, and, the contract having thus come to an end, he might very well, as he has done, sue at law to recover what he has paid."

See, also, 13 C. J. 651.

Nor can the adverse party, after a declaration of forfeiture or renunciation, withdraw his renunciation and offer to perform. 13 C. J. 657; *Anvil Mining Co. v. Humble,* 153 U. S. 540; *Roehm v. Horst,* 178 U. S. 1; *Croup v. Humboldt Quartz & Placer Mining Co., supra.*

The tender of performance in this case, after suit has been commenced, was a tender of performance after Finch had elected his remedy upon Sprague's termination of the contract. The contract was already breached by Sprague when he terminated it. At that time he could not convey to appellant the greater part of the lands. The tender was therefore too late. After a party to a contract has repudiated it, or breached it, and the other party has relied and acted thereon, he cannot reinstate the contract by an offer to perform. *Waterman v. Bryson,* 178 Iowa 35, 158 N. W. 466; *Mutual Loan Society v. Stowe,* 15 Ala. App. 293, 73 South. 202; *Quarton v. American Law Book Co.,* 143 Iowa 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1; *Roehm v. Horst, supra.* In the last cited case, the United States supreme court reviews many American and English cases upon this question.

Respondents contend, however, that inasmuch as appellant's complaint alleged: "that Finch would now be willing to perform his contract but for the fact that the defendants have placed it out of their power to perform," was an offer to accept the performance on the part of respondents if respondents were able to

perform; and that, since they did procure deeds to the whole of the land, deposited them in escrow in the bank, and plead the same, appellant is bound by the tender, and waived his right to rescind. Respondents cite *Hyde v. Heller,* 10 Wash. 586, 39 Pac. 249, where it was held that, when a plaintiff in his pleading offered to perform if defendant could and would give title, and the defendant tendered a deed in his pleading, the plaintiff waived his right to rescind. In that case the court found that the offer to receive title had been made and the vendor was personally able to comply. In the form of action brought, this allegation was immaterial. At the time the allegation was made in appellant's complaint, there is no doubt that respondents were unable to perform their contract, and although they afterwards in some way procured title to the remainder of the lands, they had already put themselves in a position to allow appellant to elect his remedy and pursue it. This he had done, and the belated tender of performance after he had brought his action, not for specific performance but for the breach of the contract, cannot be sustained. A party in default cannot put the other party in default and create a cause of action for himself, or retain that which he could not retain upon rescission, by a demand for performance or a notice of forfeiture.

We are of the opinion that, on all of the controlling facts, the evidence preponderates against the findings of the trial court, and therefore do not justify its conclusions of law and judgment.

Appellant, in his reply brief, does not seem to insist upon the recovery of any more than the $4,600 paid on the contract, with interest thereon from the respective dates of payment at the legal rate, and this, we think, is all he is entitled to. Damages by way of loss of

sales and contemplated profits were not sufficiently proven to allow such recovery. All that appellant is entitled to in the circumstances here shown is the return of the money paid, with legal interest from the respective dates of payment.

The judgment of the trial court is reversed, with directions to enter judgment in favor of appellant for the sum of $4,600, moneys paid on the contract, together with interest at the legal rate from the respective dates of the several payments.

PARKER, C. J., FULLERTON, MAIN, MITCHELL, and HOVEY, JJ., concur.

TOLMAN, J. (dissenting)—It seems to me that the majority opinion overlooks the simple governing points in this case.

Appellant knew that respondents did not have title to a portion of the land, and knew of the arrangements by which Davenport took title thereto, and the terms of his contract with respondents, before he made the payments of June 10 and June 20, 1919. That the Davenport contract called for final payment on or before December 1, 1919, in the absence of any evidence that Davenport then declared a forfeiture, or afterwards refused to accept payment and convey, is wholly immaterial. Respondents' notice to appellant of December 26, 1919, was clearly an attempt upon their part to claim a forfeiture which was provided for by the contract, and nothing more. As it did not by its terms accord appellant the benefit of the ten days of grace allowed by the contract, it was a complete nullity, and would have been held so to be if appellant had tendered the final payment within such ten-day period. Consequently, at the time this suit was instituted, the parties stood in the same position as they did before December 1, i. e., the contract was in full force and

effect; no payment was in default, and it was wholly immaterial whether or not respondents then had title. Appellant could have tendered final payment, demanded a deed, and if respondents could not then have conveyed title, might have had recourse to such remedy as he must have contemplated as a possibility when he made the earlier payments, knowing of the title in Davenport. On the other hand, at the time this suit was brought, respondents could have tendered deeds, including the Davenport interest (and it must be borne in mind that there is no evidence tending to show that they could not then have procured the Davenport interest), and demanded the final payment within ten days under penalty of forfeiture. This, the record shows, is exactly what they did, and good title to all of the land covered by the contract having been timely tendered, and final payment not having been made, appellant has no right of action.

The judgment appealed from should be affirmed.

MACKINTOSH and BRIDGES, JJ., concur with TOLMAN, J.

[No. 16475. Department One. December 5, 1921.]

JAMES H. DOWNEY, *Appellant*, v. R. E. WILBER *et al.*, *Respondents.*[1]

HOMESTEAD (12)—PROPERTY CONSTITUTING—TITLE TO PROPERTY—LEASEHOLD INTEREST. A portable bungalow on leased land, in which one resides, may be claimed as a homestead under the statute defining a homestead as the "dwelling house in which the claimant resides and the land upon which the same is situated."

EXEMPTIONS (10-18) — PROPERTY EXEMPT — NECESSARIES. Rem. Code, § 564, providing that no property shall be exempt from execution for actual necessaries, not exceeding fifty dollars in value, furnished to the defendant or his family within sixty days preceding the beginning of an action to recover therefor, even if conceded as applicable to a homestead exemption, would not apply where the evidence shows the necessaries were not furnished within the sixty-day period.

Appeal from a judgment of the superior court for Pierce county, Askren, J., entered February 26, 1921, in favor of homestead claimants, restraining a sale of property on execution, tried to the court. Affirmed.

Fayette J. Partridge, for appellant.

Kelly & MacMahon, for respondents.

FULLERTON, J.—On January 19, 1921, the appellant, Downey, recovered a judgment in a justice's court of Pierce county against the respondents Wilber for the sum of sixty-four dollars and eighty-two cents. On the ninth day of the succeeding month, he caused a transcript thereof to be filed with the clerk of the superior court, and four days later caused an execution to issue thereon. The sheriff of the county, who held the writ in execution, levied upon property which he described as "One portable bungalow named Buena Vista," and advertised the same for sale. The re-

[1]Reported in 202 Pac. 256.

spondents thereupon filed a homestead claim upon the property, together with the land upon which the same is situate, and instituted this proceeding in the superior court of Pierce county to restrain the sale. At the trial the court found the property to be the homestead of the respondents and exempt from execution, and entered a decree in accordance therewith.

The evidence adduced at the trial, while somewhat meager, shows with sufficient clearness that the building levied upon is a dwelling house in which the respondents reside, that the house is their individual property, and that it is erected on and attached to land which they hold under lease. Based upon the fact that the dwelling house is upon leased land, the appellant contends that there can be no homestead right therein. We cannot agree with this contention. The statute, it is true, defines a homestead as the "dwelling house in which the claimant resides and the land upon which the same is situated," and in defining the property from which a homestead may be selected uses the terms "his property" and "her property" in referring to the property of claimant, yet it does not necessarily follow that the interest of the claimant in the property must be title in fee. Such a construction, we think, would be contrary to the purpose and spirit of the statute. Its purpose is not to give or confirm title in the claimant, but is to prevent a forced sale of the home; in other words, to secure the claimant and his family in the possession of his home. Seemingly, therefore, if a claimant has a sufficient interest in real property to entitle him to maintain a home thereon, he has such an interest as will entitle him to protection under the homestead statute.

While the authorities on the question are not entirely uniform, the great weight of the cases, we think, support the view indicated. These it is not necessary

to review. They will be found collected in part in Ruling Case Law, under the title "Homestead", paragraphs 30, 32 and 33. For cases specifically holding that a leasehold interest will support a claim of homestead, see *Hogan v. Manners,* 23 Kan. 551, 33 Am. Rep. 199; *Deere v. Chapman,* 25 Ill. 610, 79 Am. Dec. 350; *Conklin v. Foster,* 57 Ill. 104; *Johnson v. Richardson,* 33 Miss. 462; *Wike v. Garner,* 179 Ill. 257, 53 N. E. 613, 70 Am. St. 102.

The articles furnished the appellant for which the recovery was had in the justice's court were groceries, alleged in the complaint to be "necessaries." Section 564 of the Code (Rem.) (P. C. § 7852), provides:

"No property shall be exempt from execution for clerk's, laborer's or mechanic's wages earned within this state, nor for actual necessaries, not exceeding fifty dollars in value or amount furnished to the defendant or his family within sixty days preceding the beginning of an action to recover therefor, nor shall any property be exempt from execution issued upon a judgment against an attorney or agent on account of any liability incurred by such attorney or agent to his client or principal on account of any moneys or other property coming into his hands from or belonging to his client or principal: Provided, that nothing herein shall be construed as repealing or in any wise affecting section 708, *infra.*"

Based on the fact alleged, and the provision of the statute quoted, the appellant contends that the property levied upon is not exempt from sale, regardless of the question whether the property is the respondent's homestead or not. The exception contained in the statute is, it will be noticed, "for actual necessaries, not exceeding fifty dollars in value or amount furnished to the defendant or his family within sixty days preceding the beginning of an action to recover therefor." There is no allegation in the complaint, nor

does the judgment thereon recite, that the groceries were furnished within the sixty-day period, and the evidence introduced at the present trial shows that they were not. Conceding, therefore, that the exception contained in the statute is applicable to a homestead exemption, we cannot conclude that the appellant's claim is within its provisions.

The judgment is affirmed.

Parker, C. J., Tolman, Mackintosh, and Mitchell, JJ., concur.

[No. 16622. Department Two. December 5, 1921.]

First International Bank of South Bend *et al.*, *Appellants*, v. Eli Rockey *et al.*, *Defendants*, Thomas Olsen, *Respondent*.[1]

Payment (24-1)—Presumptions and Burden of Proof—Notes. In an action on a promissory note, the burden of proof, upon the plea of payment, is upon the defendant, but the question of whether payment has been made is one for the jury.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered January 6, 1921, upon the verdict of a jury rendered in favor of the defendant, in an action on a promissory note. Affirmed.

D. E. Twitchell, for appellants.

Fred M. Bond, for respondent.

Hovey, J.—Appellant bank commissioner sued the respondent and his co-maker on a promissory note given to the bank, which is now being liquidated by the appellant. The wives of the makers of the note were also made parties.

[1]Reported in 202 Pac. 268.

The respondent, among other defenses, pleaded payment, and also plead by way of cross-complaint that there was due him a dividend upon a deposit which he had in the bank at the time it failed. The cause was tried before a jury. A verdict was returned against the appellant upon his cause of action and in favor of the respondent upon his cross-complaint. Appellant asked for a directed verdict, and now assigns error for the reason that the same was not ordered.

There was substantial evidence, if believed by the jury, to establish the case of respondent. Appellant cites *Fishburne v. Robinson,* 49 Wash. 271, 95 Pac. 80, but in that case there was no testimony to justify the submission of the defense to the jury. Appellant also cites 30 Cyc., pages 1290-1292, to the effect that the burden of proof, upon the plea of payment, is upon the defendant. This is the law, but the question of whether it has been made is one for the jury. It is also there stated that, where the evidence is equally balanced, the plaintiff is entitled to recover. There are two cases cited in support of this text, in both of which it was held that this is a proper instruction to give, but in neither of them is it held that the verdict of the jury would be disturbed, and in one of them (*Mullally v. Dingman,* 62 Neb. 702, 87 N. W. 543) it is expressly held that the question is for the jury.

The judgment appealed from is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and BRIDGES, JJ., concur.

[No. 16579. Department Two. December 7, 1921.]

EMMA L. CHAPMAN *et al.*, *Respondents*, v. THOMAS H. BAIN, *Appellant*.[1]

HUSBAND AND WIFE (19, 53, 60)—WIFE'S SEPARATE ESTATE—COMMUNITY PROPERTY — PRESUMPTIONS — EVIDENCE — SUFFICIENCY. The presumption that property deeded to one spouse after marriage is community property is rebuttable by proof that property was acquired in the name of the wife by and with the consent of the husband that it should be her separate property, at a time when its acquisition worked no hindrance to, or fraud upon, creditors.

SAME (56-1)—COMMUNITY PROPERTY—IMPROVEMENTS ON SEPARATE PROPERTY. Where improvements upon land acquired as the separate property of the wife were made from gifts of money to her by a relative, and without the employment of community funds or resources, the status of the property as that of the wife is not affected.

Appeal from a judgment of the superior court for King county, Hall, J., entered October 22, 1920, upon findings in favor of the plaintiffs, in an action for an injunction, tried to the court. Affirmed.

Almon Ray Smith and *Thos. H. Bain*, for appellant.

Geo. McKay, for respondents.

HOLCOMB, J.—Respondents brought this action to prevent the sale of the wife's separate property under a judgment against the husband alone.

The trial court, upon substantial and competent evidence in support thereof, made findings in effect as follows:

"That respondent, Emma L. Chapman, acquired the lands in dispute through a conveyance made to her on February 18, 1905, by one Margaret W. Bain, spinster, 'as her sole and separate property for the sole and separate use of Emma L. Chapman.' That the consideration paid for the above mentioned conveyance

[1]Reported in 202 Pac. 245.

was the separate money of Emma L. Chapman acquired by her by gift from her sister Hattie Bennett, and no part of the same was acquired in any way from her husband. That her husband, George W. Chapman, was present when the conveyance was made, and consented to and directed the form thereof, with the intent on his part that Emma L. Chapman should take and hold the property conveyed as her separate estate and property. That George W. Chapman was not then insolvent, but on the contrary was well able to pay, and has since paid in full all debts then owed by him, and that the debt hereinafter mentioned was not incurred for eight years or thereabouts after the conveyance above mentioned had been recorded. That all the substantial improvements on the land so conveyed to Emma L. Chapman were made with money given to her by her sister Hattie Bennett, and such improvements were not made with the community funds or property of the plaintiffs nor at their expense, nor with their community resources, or property, and that the same were made five years and upwards prior to the time when the debt was incurred upon which the judgment mentioned in the pleadings was based, except the electric light fixtures costing about $100, which were paid for by her sister Hattie Bennett, and the improvements were made in good faith and without any intent to hinder, delay or defeat the claims of creditors."

Although appellant contends that all property acquired after marriage, except gifts, devises or by inheritance by an individual spouse, is community property—that is only rebuttable presumption. In this case the evidence amply rebuts that presumption and supports the findings of the trial court that, at a time when the spouses could, without hindrance to or fraud upon creditors, acquire property by deed in the name of one as separate property, this property was so acquired as the separate property of the wife, by and with the consent and approval of the husband, and its

status was then fixed. *Katterhagen v. Meister,* 75 Wash. 112, 134 Pac. 673; *United States Fidelity & Guaranty Co. v. Lee,* 58 Wash. 16, 107 Pac. 870; *In re Deschamps' Estate,* 77 Wash. 514, 137 Pac. 1009; *Morse v. Johnson,* 88 Wash. 57, 152 Pac. 677; *In re Finn's Estate,* 106 Wash. 137, 179 Pac. 103; *Rawlings v. Heal,* 111 Wash. 218, 190 Pac. 237.

The evidence also sustains the findings of the court that all of the essential improvements on the land owned by the wife in her own separate right were made with money given to her by her sister Hattie Bennett, and were not made with community funds or property of the spouses, nor with community resources.

This disposes of appellant's other contentions, that money borrowed by one spouse or by both becomes community property, and that improvements upon separate property made with community resources is community property in the proportion that the value of such resources bears to the whole property.

There is nothing further to consider and the judgment must be affirmed.

Affirmed.

PARKER, C. J., MAIN, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16597. Department One. December 7, 1921.]

J. J. HAGGERTY *et al.*, *Respondents*, v. BUILDING INVESTMENT COMPANY, *Defendant*, AMERICAN SAVINGS BANK & TRUST COMPANY, *Respondent*, W. H. BOGLE *et al.*, *Appellants*.[1]

MORTGAGES (102, 124-1)—TRANSFER OF PROPERTY—ASSUMPTION OF MORTGAGE—PAYMENT—PARTIAL RELEASE—CREDITS—RIGHTS OF MORTGAGOR AND PURCHASER. A building company contracted two lots to appellant under an agreement to build a house thereon, giving to a bank a mortgage on the premises which the appellant assumed and had fully paid as the balance of purchase price for house and lots; subsequent to such contract, the building company included these two lots in another mortgage made to the bank to secure $2,400, under an agreement that any lot, other than the two above mentioned, should be released upon the payment of $200 each; part of the lots were released as payments were made on the note to the bank until there remained a balance due of $450.67, at which time two and one-half lots were released by the mortgagee without crediting the agreed amount of $200 per lot on the indebtedness, which would have been sufficient to satisfy the lien of the mortgage. Held, that appellant is entitled to a decree discharging his property from the lien of the building company's second mortgage to the bank.

Appeal from a judgment of the superior court for King county, Griffiths, J., entered March 26, 1921, in favor of the plaintiffs, in an action to foreclose a mortgage, tried to the court. Reversed.

Bogle, Merritt & Bogle, for appellants.

H. A. P. Myers, for respondent.

TOLMAN, J.—This case was here on a prior appeal prosecuted by the present respondents and may be found reported in 111 Wash. 638, 191 Pac. 760, to which report reference is made for a statement of the issues and facts.

[1]Reported in 202 Pac. 271.

In reviewing the case on the former appeal we said:

"We see nothing inequitable in the agreement, which the evidence seems to establish, that the lots mortgaged, other than the ones in question here, should be released upon the payment of $200 each, as they were of little value and subject to prior mortgages. Respondents are entitled to have credited upon the original loan $200 for each lot which was actually released and not lost by the foreclosure of a prior mortgage, and for any sum then remaining unpaid upon the original loan of $2,400, appellants are entitled to a judgment and the usual decree of foreclosure."

The case proceeded to another hearing in the trial court, resulting in judgment for $450.67 principal, and $838.33 interest, besides attorneys' fees and costs, all of which were decreed to be a lien to be foreclosed upon the property of appellants, and from this result, the present appeal is prosecuted.

The loan originally secured by the deed, held to be a mortgage on the prior appeal, was for $2,400. This was reduced by payments made by the original debtor to $1,042.65, for which sum the original debtor gave a renewal note, dated August 15, 1902, due sixty days after date, with interest at the rate of ten per cent per annum. Thereafter payments were made and endorsed upon this renewal note aggregating $617.35. The mortgage covered six and one-half platted lots, in addition to the two lots owned by appellants, and, as set forth in the former opinion, these lots, other than the two belonging to appellants, might be released upon the payment of $200 each. Upon the first trial, respondents contended that certain of these lots had been released and the proper amounts collected and shown to be credited by the endorsements upon the renewal note above referred to, while other lots were lost by the foreclosure of prior mortgages, and noth-

ing was received or credited on account of the lots lost by such foreclosure. Upon the last trial it was established that two and one-half lots so contended to have been lost were not so lost, but were released by respondents after the giving of the renewal note, without making any credit thereon, and respondent contended below and contends here that the payments theretofore made on the mortgage debt, aggregating some $1,400, entitled the mortgagor to a release of all lots covered by the mortgage, other than those of appellants, upon demand, without further payment. In other words, that, under the provisions of the mortgage, the mortgagor having paid $1,400 on account of the mortgage debt, without any purpose of thereby securing the release of any particular lot, and without any demand for such release, might therefore demand a release of specific lots, to the extent of the payments made, as a matter of right.

Whatever may be the rule in an ordinary case, and as an original question, we think respondents cannot now take this position. On the former trial, and the former appeal, they did not suggest such a right, but were content to rest upon the ground that they had applied to the mortgage debt $200 for each lot released, and that the two and one-half lots now shown to have been released by them were, in fact, lost to them by foreclosure of prior mortgages. Moreover, in such a case as this, equity demands that the mortgagee should be held strictly to the rights given him by the mortgage, and it not appearing that any part of the $1,400 paid prior to the giving of the renewal note was paid for the purpose of obtaining a release of any part of the mortgaged property, or that any demand was then made for any such release, it must be presumed that such payments were made in the ordinary course

for the purpose of reducing the debt only. And, as against appellants, who were in possession under claim of absolute title, without actual notice of the mortgage and in no way personally liable, it would be inequitable to permit respondents, as an afterthought, to now assert such right. Still further, on the former appeal the case was remanded for the sole purpose of determining just what lots had been actually released, and applying a credit of $200 for each lot so released, and it was specifically directed that the decree should be only for any sum remaining unpaid after such credits had been applied. It now appearing that two and one-half lots were so released, at a time when there was due on the mortgage debt only $450 and perhaps a trifling amount of interest, there must be credited (so far as appellants are concerned), at the rate of $200 per lot therefor, the sum of $500, which sum was, when the lots were released, wholly sufficient to satisfy the lien of the mortgage on appellants' property, and now entitles them to a decree discharging their property from the incumbrance.

The judgment is reversed, and the cause remanded with directions to enter a decree accordingly.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16632. Department One. December 7, 1921.]

DELLA GOSA *et al., Respondents,* v. J. ADDISON HYDE *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS (381, 390) — STREETS — AUTOMOBILES — NEGLIGENT USE — RATE OF SPEED — QUESTION FOR JURY. In an action for personal injuries resulting from being struck by an automobile, the question of the driver's negligence is one for the jury, where the evidence shows plaintiff was on the unpaved portion of a street used by street railway lines for the purpose of boarding a car; that the defendant was driving her car on the paved portion of the street adjoining the unpaved strip at an excessive rate of speed; that she swerved to the left to avoid a parked car, and due either to skidding on the slippery pavement or to the excessive speed preventing the driver from turning to the right quickly enough, the automobile ran off the paved portion of the street onto the unpaved portion and struck the plaintiff.

SAME (392) — AUTOMOBILES — DEGREE OF CARE — DUTY OF DRIVER — SUDDEN EMERGENCY — INSTRUCTIONS. The refusal of the court to give requested instructions dealing with the duty of an automobile driver when confronted with a sudden emergency was proper, where the evidence tended to show that the emergency, if any, arose from the operation of the automobile at an excessive rate of speed.

SAME (384, 392) — PROXIMATE CAUSE — INSTRUCTIONS. An instruction defining proximate cause as "the cause which immediately preceded and directly produces the effect, as distinguished from a remote cause" is not approved as applied to the facts in the case.

APPEAL (129) — PRESERVATION OF GROUNDS — REQUESTS FOR INSTRUCTIONS. An instruction as to speed limits under a city ordinance was not erroneous in failing to tell the jury that the place of an automobile collision was not within the thickly settled portion of the city, but was in that part where the twenty mile limit applies, where there was no evidence, nor any requested instruction addressed to that point.

DAMAGES (126) — MEASURE OF DAMAGES — MENTAL SUFFERING AND EXPENSES INCURRED — INSTRUCTIONS. In an action for personal injuries, an instruction including mental suffering and hospital bills as elements of damages is erroneous, in the absence of pleading and proof thereon.

[1]Reported in 202 Pac. 274.

Appeal from a judgment of the superior court for King county, Griffiths, J., entered April 14, 1921, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian struck by an automobile. Reversed.

Preston, Thorgrimson & Turner, for appellants.

Crowder & Crowder, for respondents.

TOLMAN, J.—This is an action to recover for personal injuries received by respondent Della Gosa as a result of being struck by appellants' automobile. The case was tried to a jury, which rendered a verdict against appellants in the sum of $1,500, and from a judgment on the verdict they appeal.

It is first contended that the jury should have been instructed to find a verdict in favor of appellants, or, failing that, the motion for judgment notwithstanding the verdict should have been granted. This requires an examination of the evidence to determine whether it was sufficient to take the case to the jury.

The facts, either admitted or which the jury might find from the evidence submitted, are substantially as follows: The accident happened on Rainier avenue, in the city of Seattle, in front of the plant of the Black Manufacturing Company. Rainier avenue at this point has a paved roadway, on each side seventeen feet in width, and in the center is an eighteen-foot unpaved strip occupied by a double line of street car tracks. It was the custom for a special street car, bound cityward, to stop in front of the plant on the easterly track, some distance from the street intersection, to receive the employees desiring to use it at closing time in the afternoon, and on this occasion the street car was so standing when, at about 4:45 p. m., Mrs. Gosa

and some hundreds of others were released from their labors and poured out into the street, intent on going to their homes. Those going cityward boarded the standing street car, and those going in the opposite direction passed across the street to take the street car then about due, bound southward, which also customarily stopped in front of the plant at that hour to receive passengers.

Mrs. Gosa, desiring to take the approaching southbound car, stepped into the street, passed behind the standing street car, and following a number of others who were so proceeding, and followed by one or more, was passing over the unpaved portion of the street containing the tracks, when she stumbled and fell, or partly fell on her hands and one knee; her hands at least extending out over and onto the westerly paved roadway. Just at this time the southbound street car, which had for several blocks been traveling at a speed of twenty miles per hour or more, had approached so close to the usual stopping place that the motorman had applied the brakes and was bringing the car to a stop, and Mrs. Hyde, driving a Dodge touring car, who had been pacing along beside the street car, drew ahead of it, and seeing an automobile parked next to the curb on her right, turned her machine to the left to avoid it. As she passed beyond the parked car, notwithstanding the narrowness of the paved roadway upon which she was traveling, she had sufficient room to turn again towards the right and avoid striking Mrs. Gosa. Mrs. Hyde saw Mrs. Gosa fall as she swerved to the left to avoid the parked car, and was then distant from her from ten to thirty feet, as estimated by various witnesses. She and her witnesses testify that she immediately applied her brake and her automobile skidded to the left on the wet and slippery pavement,

so that the front left wheel passed off the pavement and into the space between the pavement and the nearest rail of the street car track, the automobile thus proceeded, striking Mrs. Gosa as she was in the act of arising and had nearly regained her feet; while the witnesses for respondent testify that Mrs. Hyde apparently became confused and drove her machine needlessly too far to the left when a turn to the right would have avoided the accident. However that may be, there was evidence that Mrs. Hyde was entirely familiar with the street and the conditions there to be expected; that she was driving at an excessive rate of speed, placed by some as high as thirty miles per hour, and the jury might have found that even twenty miles per hour, permissible under the city ordinance under proper conditions, was unreasonable and excessive under the conditions here shown. Reasonable minds might very well differ as to whether or not appellants' machine skidded, or, if it did, whether the skidding was caused by the excessive speed at which it was traveling, or, if the speed was not so excessive as to be negligence under ordinary conditions, that it still was excessive for that time and place, where the released employees were known to be in the habit of boarding street cars between street intersections. The case was, therefore, properly submitted to the jury.

It is next contended that the trial court erred in the giving and refusal to give certain instructions dealing with the duty of the driver of the automobile when confronted with a sudden emergency. The instructions asked by appellants, no doubt, correctly state the law and should be given in a proper case, but they take no account of the possibility that here the jury might find that the emergency, if any, was created by the negligence of the driver through the operation of her

automobile at an excessive rate of speed, rather than by the falling of Mrs. Gosa; and therefore no error was committed in this respect.

Error is assigned upon the instruction given which defines "proximate cause" as "the cause which immediately preceded and directly produces the effect, as distinguished from a remote cause." Criticism being especially made of the words "immediately preceded." We doubt if the jury could have placed the construction upon these words which appellants suggest, but can hardly commend the definition used, as applied to the facts in this case, and in the event of another trial it would be better to use the definition approved by this court in *Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9.

Appellants complain of an instruction as to speed limits under the city ordinance, in effect, because the court did not tell the jury that the place of the accident was not within the main or thickly settled portion of the city where the twelve-mile limit applies, but was in another portion of the city where the twenty-mile limit applies. We fail to find any evidence in the record upon this point, or any request for an instruction as to the speed limit under the ordinance at the particular place in question, and therefore cannot say that the instruction given was erroneous.

In the instruction as to the measure of damages, the trial court included mental suffering as an element to be considered in fixing the compensation, and also hospital bills. There was no allegation of mental suffering in the complaint, and no proof worthy of the name that mental suffering had resulted from the injuries. Nor was there any allegation or proof that hospital bills had been incurred. Could we determine what, if any, allowance for these items, or either of them, is

included in the verdict, we might order it reduced to that extent; but there being no way in which we can even approximate what effect these items had in fixing the amount which the jury allowed, we can only return the case for a new trial.

The judgment is reversed and the cause remanded for a new trial.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16635. Department One. December 7, 1921.]

MAE GOLDEN, *Respondent*, v. EDWARD C. HYDE, *Appellant*.[1]

APPEARANCE (4—8)—GENERAL OR SPECIAL—WAIVER. Special appearance by an attorney to move the quashal of a show cause order is preserved, notwithstanding he sought to stipulate for a continuance, and also asked the court for a continuance of the hearing, since such acts did not constitute an attempt to obtain affirmative relief.

ATTORNEY AND CLIENT (49)—COMPENSATION—CLIENT'S RECOVERY OF MONEY OR PAPERS—PROCEEDINGS—STATUTES. Summary proceedings against an attorney, under Rem. Code, §§ 137, 138, apply only to money or papers which an attorney may receive in trust for his client, and have no reference to personal property delivered to an attorney, as security for his fees, where no fraud or overreaching is charged.

Appeal from a judgment of the superior court for King county, Griffiths, J., entered April 9, 1921, adjudging the defendant guilty of contempt, after a hearing on affidavits. Reversed.

J. Grattan O'Bryan, for appellant.

Robert D. Hamlin, for respondent.

[1]Reported in 202 Pac. 272.

TOLMAN, J.—Assuming to act under §§ 137 and 138, Rem. Code (P. C. §§ 186, 187), respondent filed a petition in the superior court for King county, setting up that, in August, 1920, she was arrested and committed to the county jail, charged with a crime, and that appellant, who was then and still is a duly licensed attorney at law, was retained and employed to defend her for an agreed fee of $250; that $80 on account of such fee was paid in cash, and for the sole purpose of securing the payment of the remainder, respondent delivered to appellant a certain diamond stick pin (value not stated), and executed and delivered to appellant a bill of sale therefor, absolute in its terms, the consideration named being the professional services performed and to be performed. The petition further alleges that respondent has tendered to appellant the sum of $170 in full payment of the agreed fee, and demanded the return of the stick pin, and that appellant refuses to accept the money or return the pin. The tender is renewed in the petition, and the prayer is that appellant be required to show cause why he should not forthwith surrender the pin, and upon a hearing that he be required so to do.

The show cause order was issued, returnable on a day certain, and appellant appeared specially and moved to quash. Whether this special appearance was maintained is one of the disputed points in the case. The record fails to show any ruling on the motion to quash, but it appears that the matter was heard as to the merits on affidavits, and resulted in an order which required appellant to deliver the pin described in the petition within fifteen days or to show cause why he should not be adjudged in contempt of court and punished accordingly.

Appellant failed to deliver the pin within the time fixed, made a showing to the effect that he claimed

absolute title under the bill of sale, had disposed of the pin long before these proceedings were commenced, and was wholly unable to return it. On application of the petitioner, the court entered an order in which it was recited that the excuse offered for the failure to deliver up the pin was insufficient, and wherein appellant was adjudged guilty of contempt of court, and that he be committed to the county jail, there to remain until he complied with the previous order or be sooner discharged in manner and form prescribed by law; from which order this appeal is prosecuted.

In addition to what is shown in the record as above set forth, the statement of facts shows that appellant filed with his affidavit, before the hearing on the merits, the following:

"Now comes the defendant . . . . and preserving his special appearance heretofore entered and further objecting to the jurisdiction of the court herein, files this affidavit of the defendant in replying to the show-cause order heretofore entered herein."

And also filed with his affidavits, before the hearing at which he was adjudged in contempt of court, the following:

"Preserving special appearance heretofore entered and preserved in this case, the defendant herewith submits the attached affidavits in compliance with the order of the court made on March 12, 1921."

The only action taken by appellant or his attorneys thought to be inconsistent with the attempt to maintain his special appearance was, first, to stipulate for a continuance; and second, to ask the court for a continuance of the hearing upon the first show cause order. This was not an attempt to obtain affirmative relief, and therefore not inconsistent with the special appearance. *Alaska Pacific Navigation Co. v. Southwark Foundry & Mach. Co.*, 104 Wash. 346, 176 Pac.

357. We think the special appearance was sufficiently preserved under authority of *Matson v. Kennecott Mines Co.*, 103 Wash. 499, 175 Pac. 181, and the authorities there cited.

Whether the court denied the motion to quash or ignored it, still, by preserving his special appearance, appellant did not submit himself or his rights voluntarily to the jurisdiction of the court, and may now present and have determined the right of the trial court, in the absence of consent, to proceed under the summary provisions of the statute referred to, upon the facts as shown by respondent's petition. The statute reads:

"Section 137. Proceedings to compel delivery of papers—When an attorney refuses to deliver over money or papers to a person from or for whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt.

"Section 138. Proceedings where lien exists—If, however, the attorney claim a lien upon the money or papers, under the provisions of this chapter, the court or judge may,—

"1. Impose as a condition of making the order that the client give security, in a form and amount to be directed, to satisfy the lien, when determined in an action;

"2. Summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or

"3. To refer it, and upon the report determine the same as in other cases."

As we read it, the statute refers only to those moneys or papers which an attorney may receive in trust for his client, and has no reference to an article like a

diamond stick pin which was delivered to the attorney not to be used in his client's interests, but as payment or security for his fees, especially where no fraud or overreaching is charged. 6 Corpus Juris 712, and authorities there cited. The questions in issue here are properly triable in an action at law in which either party may demand a trial by jury, if desired, and not otherwise.

The judgment appealed from is reversed, with directions to dismiss the proceeding.

PARKER, C. J., FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

[No. 16491. *En Banc.* December 8, 1921.]

L. B. SWAFFORD *et al., Respondents,* v. HARRY LEVIN *et al., Appellants.*[1]

NEW TRIAL (24)—VERDICT AGAINST WEIGHT OF EVIDENCE. Where the verdict of the jury is based upon the unsupported testimony of the prevailing party, which is inconsistent with itself and disproved by physical facts relating to the only issue in the case, there is a failure of proof, warranting the setting aside of the verdict by an appellate court.

Appeal from a judgment of the superior court for King county, Ralston, J., entered April 24, 1920, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for fraud. Reversed.

Edgar C. Snyder, Farrell, Kane & Stratton, and *Guy E. Kelly,* for appellants.

Flick & Paul, for respondents.

HOVEY, J.—This is an action by the respondent for the recovery of $5,000, as damages against the appellants, upon the ground that appellants agreed to supply

[1]Reported in 202 Pac. 254.

$100,000 in cash as the capital of a corporation in which respondent was to receive stock of the value of $5,000.

Respondent further plead that appellants were to supply a working capital of $50,000, but his recovery is predicated upon the failure to make the shares received by him worth their par value.

We believe that the undisputed facts are as follows: The respondent was a man experienced in the lumber and shingle business, and the appellants were without any experience but had some money and financial backing, and the three men had a preliminary understanding in pursuance of which the parties proceeded to secure a plant. The parties thereafter arranged with one Bird for a plant and obtained a lease for the same in the name of appellant L. H. Burnett. A corporation was organized under the name of Carnation Lumber & Shingle Company, with a capital stock of $100,000. The lease was assigned by Burnett to the respondent, and was in turn assigned by the respondent to the corporation. Nine hundred and ninety-nine shares of stock in this corporation were subscribed for by the respondent in payment for this lease and some other contracts which respondent had secured, and the remaining share was subscribed for by Carton Burnett, a brother of the appellant L. H. Burnett but not a party to this case. There appears to have been an understanding that $45,000 of this stock should be transferred to the appellant L. H. Burnett, $45,000 to the appellant Harry Levin, $5,000 to Carton Burnett, and $5,000 to the respondent. Respondent was made president and manager of the company and undertook the operation of the mill property which had been leased, and operated the same for something over a year, when a part of the plant was destroyed by fire. The company was involved in a good deal of litigation and the plant was never operated thereafter.

It is also undisputed that neither of the appellants ever paid in the full sum of $45,000, but that they did contribute substantial sums of money which were used in the operation of the plant.

The substance of the conflicting testimony was, on behalf of the respondent, that he was beguiled into this transaction by the representations of the appellants that they would contribute the full sums of money necessary to make a $100,000 capitalization and $50,000 as a working fund, and that the enterprise failed through their failure so to do; while the testimony of appellants is to the effect that they were induced to enter the venture by the respondent and that they never agreed to contribute the large sums of money as claimed, but only a moderate amount that might be needed for operating the small plant contemplated.

At the conclusion of the respondent's case, a motion for judgment *non obstante* was made and denied, and this motion was renewed at the close of the case. The jury found a verdict in favor of the respondent in the full amount claimed. Motion for a new trial was made and denied by the trial court.

In passing upon the motion for a new trial, the trial court used language indicating that it was its opinion that a new trial should be granted, but after indulging in some criticism of the supreme court, concluded that, inasmuch as this court would have to pass upon the case, it would not disturb the verdict. If the record correctly states the court's views as to the verdict it should have granted a new trial, as it was its province, and not the province of this court, where it considered the verdict against the weight of the evidence. *Ziomko v. Puget Sound Electric R.*, 112 Wash. 426, 192 Pac. 1009.

As we view the case, the only question to be considered is whether there was evidence offered on behalf of

the respondent justifying the submission of the case to the jury.

Respondent's whole case rests upon his own testimony, with the only corroboration being the testimony of Bird as to some bragging by the appellants as to their wealth and the statement of appellants in which Bird claims they said that they were going to make Swafford's stock worth $5,000. The respondent testified in accordance with the allegations of his complaint, and when it came to the question of his connection with the actual incorporation of the company, he practically denied all connection with it, except admitting his signatures hereinafter referred to and that he had transferred the lease as payment for the stock. He claimed that the appellants were to put in in cash $100,000 for capital and an additional sum of $50,000, and that he was ignorant of the fact that the money had not been paid in at the time of the organization, and yet the first $2,000 that the corporation secured was upon respondent's own note endorsed by the appellant Burnett. The money on this note was obtained on Burnett's bank and was afterwards repaid by Burnett.

There appear in the record the articles of incorporation, the by-laws, the first meeting of the board of trustees, a waiver of notice, oath of trustees and subscription to capital stock, each being subscribed by the respondent. All of these signatures were claimed by respondent to have been made upon blank sheets of paper, and in answer to repeated questions upon this subject, and throughout a lengthy cross-examination, he stated, without any reservation, that nothing whatever was written upon any one of these papers at the time he signed his name, and he had never seen any of the documents in their present form until long after the transaction. We are convinced that this testimony is manifestly false. The documents are all type-

written, of varying length, and every one of the signatures appears in a different position upon the sheet of paper from all of the others and immediately following the typewritten matter, and each signature of the respondent is followed by that of Carton Burnett, who was his fellow incorporator. The articles of incorporation are signed at the extreme top of the third page, the by-laws at the bottom of the fourth page, and the waiver of notice and the oath of trustees are on the same page with the two signatures of both respondent and Carton Burnett, each properly placed, and the subscription to stock immediately follows four lines of printed matter at the top of the page. All of the documents except the articles of incorporation are written on both sides of the sheets of paper. These transactions are so interwoven with all of the business in the organization and capitalizing of this company as to necessarily make them a component part, and where respondent's case rests upon his own unsupported testimony and is conclusively disproved by the physical facts relating to the only issue in the case, his action should fail. In our opinion, this verdict is palpably wrong. The testimony on one side is consistent and in harmony with known facts, and that on the other is inconsistent with itself and with such known facts and is manifestly against the evidence, to the extent that it amounts to a failure of proof. In our opinion, it is our duty not to let it stand. 4 C. J. 856-7.

The judgment appealed from is reversed and the action ordered dismissed.

Parker, C. J., Mitchell, Mackintosh, Fullerton, Main, Holcomb, and Bridges, JJ., concur.

[No. 16629. Department Two. December 8, 1921.]

JOSEPH FORD, *Respondent*, v. LESCHI MARKET & GROCERY COMPANY *et al.*, *Appellants*.[1]

PLEADING (134, 136)—BILL OF PARTICULARS—RIGHT TO—EXCUSE—SUFFICIENCY OF COMPLAINT. In an action brought to recover a balance due on account, one item being for wages in the sum of $525, which did not set out the rate per month, or the months for which payment was delinquent, or payments made on account thereof, the plaintiff is precluded from giving evidence as to such item, under Rem. Code, § 284, where he fails to file a bill of particulars ordered by the court on demand of the defendant.

SAME (134)—DEMAND FOR PARTICULARS—WAIVER. Answer to a complaint on account, after failure of plaintiff to comply with an order for a bill of particulars, does not constitute a waiver of the demand by defendant.

Appeal from a judgment of the superior court for King county, French, J., entered April 8, 1921, in favor of the plaintiff, in an action on account, tried to the court. Modified.

Baxter & Jones, for appellants.

Walter B. Allen, for respondent.

MAIN, J.—This action was brought for the purpose of recovering the balance due on an account. The trial court permitted a recovery in the sum of $398.97, and entered judgment accordingly. The defendants appeal.

The appellants had been operating a grocery store and market since the latter part of the year 1915, and the respondent had worked for them in the store until the latter part of November, 1919. The business was under the supervision of Walter D. Allison, the son of the appellant Etta Allison, until October, 1917, when he entered the army of the United States, where he was until the 30th day of April, 1919. While Walter D.

[1]Reported in 202 Pac. 247.

Allison was in the service, the respondent acted as manager of the store. In this capacity he made the purchases, paid the accounts, drew checks, and a considerable portion of the time kept the books. He admitted that his salary had been fully paid up to the first of March, 1919, but claimed that, subsequent to that time, there was a balance due him of $525. Paragraph 2 of the complaint is as follows:

"That for about four years prior to November, 1919, the plaintiff performed services and labor for the said Leschi Market & Grocery Company upon which there is a balance due him of five hundred and forty-eight dollars and ninety-seven cents ($548.97), as follows:

"Balance due on wages.....	$525.00
One (1) calf furnished his employer..	16.06
Payment on truck.....	1.00
Groceries furnished his employer...	6.91"

After the complaint was served, the appellants served a demand that they be furnished "with a bill of particulars of the items of the account alleged in the complaint herein." This demand was served on the 6th day of April, 1920. The demand was not complied with, and on the 17th day of April, 1920, the appellants answered by general denial. Upon the trial the appellants sought to prove payment, which was objected to on the ground that it had not been pleaded. They were permitted to amend and the cause was continued until the following day, upon the condition that the appellants furnish an itemized statement showing when the payments were made. When the respondent offered testimony as to the balance of the salary claimed to be due by him, it was objected to because he had not complied with the demand for an itemized statement. This objection was overruled and the trial proceeded as above indicated.

The first and controlling question is whether the respondent, not having complied with the demand to itemize the balance that he claimed due for salary, was entitled to introduce evidence in support thereof. Remington's 1915 Code, § 284 (P. C. § 8368), provides:

"It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further account, when the one delivered is defective; and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished."

It will be noticed by this statute that, unless the demand there provided for is complied with, the party in default shall be precluded from giving evidence of the matters pleaded to which the demand was directed. With reference to this statute, in *Sanborn v. Dentler*, 97 Wash. 149, 166 Pac. 62, it was said:

"It is true that, in many cases, the requirement of a bill of particulars is a matter of discretion with the court; but under our practice, under Rem. Code, § 284, when an account is sued upon, unless the party, within ten days after demand therefor in writing by the adverse party, shall deliver to the adverse party a verified bill of particulars of the items of the account, *he is precluded from giving evidence thereof,* and in case an itemized account stated is defective, the court may order a further account. It was shown at the trial that the respondent kept an account book with all his accounts shown therein, and that the particular items of account with Mr. and Mrs. Woodman were kept in that book in the ordinary course of business, together

with other accounts, and all the items of the visits and memoranda as to the nature of the ailments with which the patients were suffering were kept therein. In *Plummer v. Weil,* 15 Wash. 427, 46 Pac. 648, we held that an allegation in connection with the bill of particulars, to the effect that it was impossible for the party relying thereon to comply with the order of the court any better than he had already done, or to make the bill of particulars any more specific on the points directed in the order of the court, furnished no excuse; and it was stated that the bill of particulars furnished was insufficient and 'its insufficiency cannot be excused upon the ground that plaintiff kept no books and cannot specify the services or state their value. He assumed the burden of so doing when he brought his action in the present form. . . . "The failure to keep an account of these services is the fault of the plaintiff, and he must suffer for it, if any one." ' . . .

"It certainly was as possible for respondent to itemize the quantity and value of the medicine furnished by him at each visit, when making his entries in his book, as it was for him to itemize the number and length of his visits, the nature of the other services performed by him, and the kind of medicines furnished. If he could not, he is the one who should suffer. Under the statute heretofore quoted, we think his evidence as to the amount and value of the medicines furnished should have been excluded for his failure to furnish, upon demand, a bill of particulars thereof."

The present case falls within the holding of that case. The respondent seeks to be relieved from complying with the demand, first, because he claims that the statement in the complaint was sufficient; and second, that, by answering, the demand was waived. The complaint, so far as the balance due for services is concerned, simply specifies balance due on wages $525. It does not set out either the rate per month or the months during which the salary claimed had been earned. Neither does it set forth any payments. These were matters which were within the respondent's know-

ledge and which the appellants had a right to be informed of in order that they might be in a position to meet his demand. There is no merit in the other position taken by the respondent, to the effect that, by answering, there was a waiver. There was a failure here to comply with the specific statute which provides that, if such a demand is not complied with, the party in default shall "be precluded from giving evidence thereof." It was error for the trial court to permit the testimony in support of the balance claimed to be due for salary and to enter judgment in any amount on that item.

The cause will be remanded to the superior court with directions to modify the judgment as herein indicated.

PARKER, C. J., HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur.

[No. 16664. Department One. December 8, 1921.]

WALTER THOMPSON, *Appellant*, v. T. THOMPSON *et al.*, *Respondents*.[1]

LIENS (2)—STATUTORY LIENS—RIGHT TO LIEN—CONSENT OF OWNER—STATUTES. One repairing an automobile at the request of a gratuitous bailee of the car is not entitled to a lien for services as against the owner, under Laws 1917, p. 229, § 1, which authorizes a lien for labor performed or materials furnished in the repair of a chattel "at the request of the owner."

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 20, 1921, upon findings in favor of the defendants, in an action in replevin, tried to the court. Reversed.

Henry Clay Agnew, for appellant.

E. C. Hudson, for respondents.

[1]Reported in 202 Pac. 261.

Bridges, J.—Suit to recover possession of an automobile. At the time of the commencement of this action the plaintiff was, and for some time prior thereto had been, the owner of a certain automobile which was in the possession of defendant. Plaintiff took possession under the claim and delivery statutes. There was a judgment in favor of the defendant, from which the plaintiff has appealed. None of the testimony has been brought to this court, and the sole question is whether the findings of fact made by the trial court support the conclusions and judgment.

The court found that the appellant, plaintiff below, was the owner of the automobile in question, and that the respondent, defendant below, was an automobile mechanic; that the appellant gave one Morris the possession of the automobile, "as a gratuitous bailee for a period of several months"; that Morris did not hold such possession by virtue of any agreement to purchase and was not the appellant's agent; that the respondent made certain repairs upon the automobile at the request of Morris, while the latter had possession, and that respondent had not been paid for his services, and that he retained the machine and filed a lien thereon as provided by statute. The court also found that the appellant had no knowledge of the fact that Morris had ordered the materials or labor, and never authorized him so to do. Based upon these findings, the court concluded that the respondent was entitled to judgment for the return of the automobile, or, in the event of failure to return it, judgment against the appellant and his surety for the amount of the lien. The judgment follows the conclusions.

It is plain to us that the findings do not support the court's conclusions or the judgment. Section 1, Laws of 1917, p. 229, provides that every person performing labor or furnishing materials in the construction or

repair of any chattel, "at the request of the owner," shall have a lien. The trial court expressly found that the appellant did not request or authorize this work, and that Morris, when he ordered the work to be done, did not represent appellant and was not his agent. Since, under the statute, the lien may be had only where the work was done at the request of the owner or his agent, we must conclude, under the facts as found by the trial court, and which we cannot review, that the respondent had no right to a statutory lien.

The appellant cites the recent case of *Wilcox v. Mobley,* 116 Wash. 118, 198 Pac. 728, as controlling here, while the respondent calls our attention to the case of *Crosier v. Cudihee,* 85 Wash. 237, 147 Pac. 1146. Neither of those cases are controlling in fact here, but the *Wilcox* case is controlling in principle. The facts of those two cases are very much the same. In each the chattel had been sold under the terms of a conditional sales contract and the purchaser put into possession, and in each the purchaser had repairs made without the request or knowledge of the seller, and in each the person making the repairs had filed a lien for his services. In the *Crosier* case, we held that the lien might be enforced, and in the *Wilcox* case we held to the contrary. This apparent conflict is accounted for by a change in the lien statutes. The *Crosier* case was controlled by § 1154 *et seq.,* Rem. Code. The *Wilcox* case was controlled by Laws of 1917, ch. 68, p. 229. Section 1156, Rem. Code, provided:

"Every person who is in possession of a chattel, under an agreement for the purchase thereof, . . . shall, for the purposes of this act, be deemed the owner thereof . . ."

The 1917 amendment of this section eliminated the provision just quoted from the original section. The only thing in the sections as amended affecting this

question is that the person doing the work on the chattel may have a lien, provided the work was done at the "request of the owner."

The judgment is reversed, and the case remanded with directions to the lower court to enter judgment in favor of the appellant, plaintiff below.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 16690. Department Two. December 8, 1921.]

In the Matter of the Estate of GEORGE ADIN.[1]

EXECUTORS AND ADMINISTRATORS (159-1)—ACCOUNTING—DISBURSEMENTS—LAST SICKNESS—PROVISIONS OF WILL. A will providing that a named beneficiary should take nothing thereunder, until he should execute a release and acquittance of all demands which he may have against the testator or his estate, did not contemplate a claim based on the fact that such beneficiary had become responsible for the expenses of the testator's last sickness.

SAME (45)—MANAGEMENT OF ESTATE—PERSONAL PROFIT—POSSESSION OF PROPERTY. Where, under the terms of a will and by agreement of the beneficiaries, an administrator, who had been given a life estate in a tract of land, had gone into possession and personally profited thereby, such fact could not be urged as an objection against his final account.

SAME (163)—SETTLEMENT AND ACCOUNTING — COMPENSATION — WAIVER OF RIGHT. The heirs of an executor who had died pending administration cannot complain there was no allowance for services of such deceased executor in the final account, where no account had been filed on behalf of the deceased executor and the report made no provision for compensation to either executor or administrators.

WILLS (85)—RIGHTS OF DEVISEE—CLAIMS—CONSTRUCTION OF WILL —DUTY TO CANCEL. An objection that an administrator with the will annexed had not cancelled every claim which he had against the estate as required by a bequest in his favor is without merit, where the record shows he never presented any claim against the estate, and that he had filed a proper acquittance with the deceased executor of the estate.

[1]Reported in 202 Pac. 262.

EXECUTORS AND ADMINISTRATORS (158)—SETTLEMENT AND ACCOUNTING—USE AND OCCUPATION OF PREMISES. An objection to the final account of an administrator on the ground that the expenses of administration were not a pro rata charge against the devisees, legatees and beneficiaries is not well taken, where the will expressly provided the charges should be prorated, and such charges were necessarily incurred and paid by the administrator, and were less in amount than if the fees due the administrators, but not charged, had been included.

Appeal from an order of the superior court for Skagit county, Brawley, J., entered June 8, 1921, approving the final account of an administrator, after a hearing before the court. Affirmed.

Robert A. Devers and *Edward Judd,* for appellants.
R. V. Welts and *Coleman & Gable,* for respondent.

MACKINTOSH, J.—The will of George Adin was sustained by this court in *In re Adin's Estate,* 112 Wash. 93, 379, 191 Pac. 839, 192 Pac. 887. By the terms of the will, Milo A. Root was appointed executor of the estate, and after his death Severene Olson and Edward Crandall were appointed administrators with the will annexed, and Olson has filed his account and report, to which the Root heirs have objected, and which, after a hearing, has been approved, and from that approval this appeal is taken.

Olson, who had for a great many years been a friend and employee of Adin, and had been promised a part of Adin's property in consideration of his services, was, by the provisions of the will, taken care of as follows:

"I expressly direct, however, that no property herein mentioned or referred to shall go to Severene Olson, and he shall take nothing under this will, until he shall execute and deliver to my executor a release and acquittance in full of every and all demands which he may have, or claim to have, against me or my estate at the time of my death—the devises and bequests to him

herein made being in lieu of any and all interests which he may have or claim to have in any property, or in any portion thereof, or in any claim or obligation against me that he may have or claim to have. Said deed and acquittance shall be duly executed and delivered to my executor within thirty days from the date upon which this will is admitted to probate."

By the terms of the will, Mary Crandall and Philip and Alice Whitehead, relatives of Adin, were given parts of the estate. Milo A. Root was given a portion, and several others were given small portions. The will provided a method of compensation for the executor different from that generally obtaining:

"Within a reasonable time after this will is admitted to probate, my executor shall prepare and file an inventory, setting forth the portion or amount given, devised or bequeathed to each and every devisee, legatee and beneficiary herein, and shall have each and every portion appraised by three disinterested appraisers appointed by him, who shall fix the value as of the time of my death. . . . The compensation of my executor shall be ten per cent upon the value of my entire estate, and in case of litigation concerning this will, or in any way in the administration of my estate, he shall receive such additional sum or sums as shall be fair and reasonable. Each devisee, legatee and beneficiary shall pay to my executor for costs and expenses of administration and executor's fees and expenses, such proportional portion of the entire amount there as the appraised value (as aforesaid) of his or her portion bears to the entire value of all my property appraised as hereinbefore provided for; and such portion of the costs, fees and expenses of administration, including my executor's compensation, shall be and remain a lien upon the portion of each devisee, legatee and beneficiary and my executor is hereby authorized to sell any such property for its portion of such costs, fees, expenses and compensation, if the same is not paid within six months from date of probate of this will."

Root, as executor, had the inventory and appraisement made as directed, which fixed the value of the shares going to the different parties as of the time of Adin's death. At the time of the appointment of Olson and Crandall as administrators with the will annexed, it was agreed in open court by everyone having an interest in the estate that they might each take immediate possession of their shares of the estate, and this arrangement was thereupon put into effect, and from that time on every one of the devisees, legatees and beneficiaries, except the non-resident heirs, took his or her share and controlled, managed and operated it without any further consideration of the probate proceeding. A contest was waged over the validity of the will, and in this contest certain expenses were incurred. During administration, as appears by Olson's report, he came into possession of various sums of money from several parts of the estate, and he has credited those sums upon the expenses of administration which he has prorated among the interested parties, as provided for in the last section of the will which we have quoted, and has asked that the balance remain a lien upon the portion of each devisee, legatee and beneficiary according to the provisions of that portion of the will.

There are several objections made to the confirmation of Olson's report:

(1) It is urged that Olson was not entitled to appointment as administrator for the reason that his petition for appointment alleged he was a creditor, and that he could not, under the terms of the will, be a creditor of the estate and at the same time a recipient of a portion of it. As we read the will, the provision thereof relating to an acquittance from Olson would not refer to such a claim as Olson alleged in his petition as entitling him to the appointment, the petition being based upon the fact that Olson had become re-

sponsible for the expenses of Adin's last sickness. His assertion of that claim was not such an one as was contemplated by the acquittance provision of the will. Furthermore, the order appointing him administrator was not based upon his right of appointment as a creditor, for the court found, as a matter of fact, that he was not a creditor, and appointed him for the reason that he was a fit and proper person.

(2) It is objected that Olson personally profited by the administration of the estate, for the reason that he has used since his appointment the forty acres of land in which he was given a life estate by the will, and that the record shows an application by Olson to be allowed to lease this property to himself. Viewed in any light, this objection is of no effect for the reason that, under the terms of the will, and by the agreement of the parties, Olson was entitled to the possession of this property, and did not go into possession of it by virtue of any lease from himself as administrator.

(3) The report is objected to because it provides for no compensation for Root for services rendered by him as executor before his death. The answer to this lies in the fact that the account before us is Olson's final account, and that no account has been filed on behalf of Root, and there is no provision in the report for any compensation to either the executor or administrators. The services of the administrators being greatly in excess of those rendered by Root, the Root heirs are in no position to complain, for the reason that, if expenses had been allowed the executor and administrators, their pro-rata share would have more than consumed the portion that was allowed to them as heirs of Root.

(4) It is next objected that Olson could not take the property bequeathed and devised to him for the reason that he had not cancelled every claim which he had

against the estate. The record satisfies us that Olson has never presented any claim against the estate, and there is sufficient proof that a proper acquittance was filed with Root. Furthermore, the will does not provide that Olson should not take his share of the estate *unless he files an acquittance,* but merely provides that he shall not take *until* such acquittance is filed, and under such a provision it is not yet too late for Olson to file an acquittance.

(5) The next objection is that the attorney's fees in the will contest were not properly apportioned. An examination of the record does not persuade us to make any change in this apportionment.

(6) Error is alleged referring to the failure of Olson to account for the income of the portion of the estate which he has occupied. This is based upon the argument that Olson was not entitled to such possession. As we have already seen, there is no merit in this contention, for by the agreement of the parties, under the provisions of the will, Olson was entitled to take possession at the time he did.

(7) The report is said to be erroneous because it allowed Olson to take possession of certain personal property belonging to Root which has not been delivered to Root or his heirs. The report shows nothing to substantiate such an objection, but, on the contrary, shows that all of the personal property which belonged to the Root estate had been accounted for as having been used in payment of the debts on the property taken possession of by Root, and that the balance is accounted for in Olson's hands, and is to be used in giving credit for the charges against the Root estate for its proportionate share of the expenses of administration.

Other minor objections are made which are without merit.

Boiled down to essentials, the two main contentions made by the appellants are, first, that Olson was not entitled to his share of the estate because he never released any claims he may have had against Adin; and second, that the expenses of administration were not a pro rata charge against the devisees, legatees and beneficiaries. The first of these contentions we have already answered by showing that Olson has asserted no claim, and that as to the matter of filing an acquittance, the evidence shows that one was actually filed. On the second point, the will itself expressly provided that the charges shall be prorated, and the charges which were prorated were ones necessarily incurred and paid by Olson and, as a matter of fact, are less in amount than they might have been had Olson included fees for the administrators.

Taking the record as a whole, we see no reason for disturbing the order of the probate court in approving the final account. The judgment is affirmed.

PARKER, C. J., MAIN, HOLCOMB, and HOVEY, JJ., concur.

[No. 16512. Department Two. September 26, 1921.]

PHILIP DANIELS, *Appellant*, v. JOHN B. COOKE *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered January 4, 1921, upon findings in favor of the defendants, in an action for services rendered, tried to the court. Affirmed.

Fred M. Williams, for appellant.

E. Ben Johnson, for respondents.

MITCHELL, J.—This action was commenced against John B. Cooke and wife and E. A. Parisot. Shortly thereafter, E. A. Parisot died and no one was substituted for him as a party defendant. The purpose of the action is to recover for personal services claimed to have been performed for the defendants, whom it is alleged were partners in mining operations in Idaho. John B. Cooke and wife, by their answer, denied the existence of the partnership. Upon the trial of the case without a jury, the decision and judgment were in favor of the defendants Cooke and wife, from which the plaintiff has appealed.

The trial court found that the allegation of partnership was not sustained, and that the labor performed by the appellant was for E. A. Parisot in his own individual name and account. Examination and consideration of the evidence satisfies us to the same effect.

Affirmed.

PARKER, C. J., MAIN, and TOLMAN, JJ., concur.

[No. 16319. Department Two. September 26, 1921.]

MARY DIMITROFF, *as substituted for J. C. Howe, Trustee, Appellant*, v. JOHN BARTON PAYNE, *Director General of Railroads, Respondent*.[2]

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered July 28, 1920, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

W. B. Mitchell, for appellant.

Edward J. Cannon, F. J. McKevitt, and *Orville W. Duell*, for respondent.

[1]Reported in 200 Pac. 455.

[2]Reported in 200 Pac. 1102.

MITCHELL, J.—The complaint in this action was filed in the superior court of Spokane county, on March 2, 1920, by J. C. Howe, as trustee. By stipulation of the parties and an order of court, Mary Dimitroff was appointed as the successor of J. C. Howe, trustee. The action is to recover for railroad ties sold and delivered to the defendant. On the trial to the court without a jury on June 30, 1920, there was judgment for the defendant, from which the plaintiff has appealed.

The trial court made findings of fact substantially as follows: (1) That John Barton Payne, by appointment of the President, is acting as the successor of Walker D. Hines, formerly director general of railroads. (2) That the Northern Pacific Railway Company is a corporation engaged in interstate commerce. (3) That W. B. Mitchell sold and delivered on the Northern Pacific Railway Company's right of way at Hauser, Idaho, to Walker D. Hines as director general, in April and May, 1919, one thousand two hundred and fourteen railroad ties of the agreed value of $784.21. (4) That in procuring and manufacturing the ties, W. B. Mitchell employed a number of laborers he did not pay and who, in proper time and pursuant to the laws of Idaho, in which state the ties were procured and made, duly filed and recorded notices of lien for their labor on the ties. That an action was brought on July 7, 1919, in the district court of Idaho for Kootenai county (which court is one of general jurisdiction) for the foreclosure of the liens. That the district court of Idaho for Kootenai county had jurisdiction of the subject-matter of the action. That, following the commencement of the action in the district court of Idaho, W. B. Mitchell made and delivered to J. C. Howe an instrument in writing, dated July 10, 1919, by which he assigned the account of $784.21 owing by the director general of railroads. That thereafter W. B. Mitchell duly appeared in the foreclosure of lien actions in the district court of Idaho, wherein a trial was had which resulted in findings, conclusions and a decree of foreclosure of the liens on November 8, 1919. (5) That the district court of Idaho for Kootenai county had full and complete jurisdiction of the matters in controversy. That the ties herein in question were the same ties on which the plaintiffs therein had performed labor. That the amount due from the director general of railroads was insufficient to pay the lien claims, and that, pursuant to an order of the district court of Idaho, he paid the $784.21 into court to be applied on that judgment. (6) That the judgment of the district court of Idaho for Kootenai county is binding upon this court, and that, during the pendency of the action in Idaho, J. C. Howe delivered to the attorneys for the director general an instrument in writing as follows:

"Mr. Edward Ferris, Sept. 20, 1919.

"Attorney at law, Old Nat'l Bank Bld'g.

"My dear Sir: In re the assignment from W. B. Mitchell to myself of his claim against the Ry. Co. for ties. If the Court of last resort shall hold that the plaintiffs have a valid lien against the 'ties' sold by Mitchell to the Ry. Co., I hereby agree that I will abide by such decision as against any rights which I may have under and by virtue of said assignment from Mitchell to myself, as far as Walker D. Hines and the Railway Co. are concerned.

"Trusting that the above will be sufficient to assure that your client will be held to no liability by virtue thereof, I am,

"Very truly. J. C. Howe.

"On conditions that you do not tender money in court unless the liens are held valid."

Written exceptions were filed to the findings.

The assignments of error are argued as one. They refer to the weight of the evidence. The evidence clearly preponderates in favor of the findings made, and also shows that no appeal was perfected from the judgment of the district court in Idaho within the time limited therefor, or at all.

Affirmed.

PARKER, C. J., MAIN, BRIDGES, and TOLMAN, JJ., concur.

[No. 16177. *En Banc.* November 15, 1921.]

LEONARD LONGMIRE *et al.*, *Respondents*, v. YELM IRRIGATION DISTRICT, *Appellant.*[1]

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered November 2, 1919, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for an injunction and damages. Reversed.

Geo. F. Yantis and *Troy & Sturdevant*, for appellants.

Thomas M. Vance, for respondent.

ON REHEARING.

PER CURIAM.—This cause was reargued before the court *En Banc* on October 25, 1921. Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of Department Two, reported in 114 Wash. 619, 195 Pac. 1014, the judgment of the trial court is reversed as in the Department opinion directed.

[1]Reported in 201 Pac. 788.

[No. 16390. Department Two. November 28, 1921.]

H. P. McGLOTHERN, *Appellant*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.[1]

Petition filed in the supreme court August 3, 1921, for leave to intervene in an action. Denied.

W. R. Crawford and *Morris B. Sachs*, for appellant.

Walter F. Meier, *George A. Meagher*, and *Charles T. Donworth*, for respondents.

George F. Vanderveer, for petitioners.

ON PETITION TO INTERVENE.

PER CURIAM.—The opinion in this case, 116 Wash. 331, 199 Pac. 457, was filed on July 20, 1921. A stipulation, dated the same day and signed by the attorneys for the respective parties, provided that the temporary injunction entered by the superior court on July 19, 1920, be modified so as to include the "plaintiff and intervenors herein but not otherwise." On July 22, 1921, an order was entered in accordance with the terms of the stipulation. On the 19th day of August, 1921, a petition was filed by parties not covered by the injunction as modified, and who claimed the right to the benefit of the injunctive relief because they were similarly situated. A hearing was had upon this petition, and subsequent to such hearing, a petition for rehearing in the principal case has been filed and denied. The matter covered by the petition for leave to intervene has, therefore, become only a moot question and does not call either for discussion or decision.

As a matter of form only, the petition will be denied.

[1]Reported in 202 Pac. 1.

[No. 16588. Department Two. December 7, 1921.]

MYCHEL COMPANY, *Respondent*, v. PERCY GARDINER, *Appellant*.[1]

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered January 29, 1920, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

G. D. Eveland and *Percy Gardiner*, for appellant.

D. W. Locke, for respondent.

PER CURIAM.—This action seeks to have conveyed to a corporation certain mining properties the title to which was acquired through a tax sale by the managing officer of the company. The record sustains the action of the trial court in ordering the conveyance, and the decree is affirmed.

[1]Reported in 202 Pac. 1119.

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Care required in operating automobiles on highway, see HIGHWAYS, 4-6.

Injuries from in city street, see MUNICIPAL CORPORATIONS, 10-15.

Collision with street car, see STREET RAILROADS, 2-4.

Award:

See ARBITRATION AND AWARD.

Of property on annulment of marriage, see MARRIAGE, 2.

Bailment:

1. BAILMENT (3)—LOSS OF GOODS—LIABILITY OF BAILEE. One accepting the control of premises in which household goods and other personal property is temporarily stored becomes a gratuitous bailee of the contents of the house, and as such chargeable with the use of reasonable care. *Murphy v. Schwark*..... 461

Banks and Banking:

1. BANKS AND BANKING (14)—VALIDITY OF LOAN—AUTHORITY OF OFFICER—NOTICE OF FRAUD. Where the president and executive officer of one bank pursued a policy of discounting commercial paper and opening a credit account thereon with another bank, on the representation that they were bona fide loans to solvent borrowers which his bank could not handle, the transaction was not on its face so out of the ordinary course of business as to put the discounting bank on inquiry as to any fraudulent intent of such officer to appropriate the money to his personal use; and hence the discounting bank cannot be held liable to the other bank for the defalcation of the money by the latter's president. *First National Bank of Bremerton v. Guardian Trust & Savings Bank*..... 231

Banks and Banking—Continued.

2. BANKS AND BANKING (25)—RIGHTS AND LIABILITIES AS BETWEEN BANKS—NEGLIGENCE. Negligence of a bank in handling a trade acceptance will not support an action in favor of one to whom the bank owed no duty respecting the instrument. *Prescott Co. v. Franklin Tool Works*..... 283

Bar:

By election of remedy, see ELECTION OF REMEDIES.
Of action by former adjudication, see JUDGMENT, 7, 8.

Bequests:

In general, see WILLS.

Bill of Lading:

Delivery of bill of lading, see SALES, 3.

Bill of Particulars:

In pleading in civil action, see PLEADING.

Bill of Sale:

As passing title, see SALES, 10.

Bills and Notes:

Burden of proof to show payment, see PAYMENT, 2.

1. BILLS AND NOTES (22)—CONSTRUCTION—ATTORNEY'S FEES. A promissory note agreeing to payment of "——— dollars" for attorney's fees in case of suit for collection is an express stipulation for a reasonable amount as an attorney's fee. *Hawley v. Isaacson* 197

2. BILLS AND NOTES (34)—TRADE ACCEPTANCES—NEGOTIABILITY—TIME OF PAYMENT—HOLDER IN DUE COURSE—STATUTES. A trade acceptance reciting "on December 1, pay to the order of G. W. Laing," is incomplete so far as fixing date of payment, and hence constitutes a non-negotiable instrument against which the drawee has a right to defend, in view of Rem. Code, § 3443, which defines a holder in due course as "a holder who has taken the instrument under the following conditions: (1) that it is complete and regular on its face." *United Railway & Logging Supply Co. v. Siberian Commercial Co.* 347

3. SAME. Where a trade acceptance attempts to fix, without completing, the statement of time of payment, it does not come within the definition of Rem. Code, § 3398, declaring an instrument is payable on demand ". . . (2) in which no time of payment is expressed." *United Railway & Logging Supply Co. v. Siberian Commercial Co.* 347

Bills and Notes—Continued.

4. BILLS AND NOTES (60, 73-6)—ASSIGNMENTS—DEFENSES AGAINST BONA FIDE PURCHASERS—SET-OFF OR COUNTERCLAIM. Where a promissory note made in consideration of the sale of hotel furniture and fixtures has passed into the hands of a holder in due course, the maker cannot, in a suit upon the note by such holder, offset the value of a part of the furniture not owned by the payee, and of which the maker has been dispossessed at the suit of the true owner. *Bowen v. Rury* 30

5. BILLS AND NOTES (97, 98)—SALES (127)—ACTIONS—DEFENSES—WANT OF CONSIDERATION. Loss of goods after delivery by seller to carrier will not sustain a defense of want of consideration for notes given for the purchase price. *National Finance Co. v. Emerson* 297

6. BILLS AND NOTES (127)—ACTIONS—ADMISSIBILITY OF EVIDENCE—FRAUD. In an action on a promissory note, to which the defense was set up that it was procured through false and fraudulent representations as consideration for the sale of publishing rights for a directory in certain territory, evidence concerning the acts and conduct of the seller subsequent to the consummation of the sale was properly admissible upon the issue of fraud. *Horowitz v. Kuehl* 16

Bona Fide Purchaser:

Of bill or promissory note, see BILLS AND NOTES, 2-4.

Bonds:

Amount of supersedeas bond on appeal, see APPEAL AND ERROR, 7.
Local improvement bonds, see MUNICIPAL CORPORATIONS, 5, 6.
Issuance and sale to pay soldiers' bonus, see STATES, 2.

Bonus:

Soldiers' bonus, see ARMY AND NAVY.
Persons entitled to compensation under soldiers' bonus act, see BOUNTIES.

Boundaries:

Description of in notice of hearing on petition to incorporate town, see MUNICIPAL CORPORATIONS, 1.

1. BOUNDARIES (10-1)—PARTIES (42)—ESTABLISHMENT OF BOUNDARY—BRINGING IN NEW PARTIES—INTEREST IN CONTROVERSY. In an action to determine the boundary line between two owners of quarter sections of land under the government survey, adjoining landowners who may or may not be affected by a relocation of the section corners are neither necessary nor proper parties. *Smith v. Anderson* 307

Boundaries—Continued.

2. SAME (12)—EVIDENCE—ADMISSIBILITY. In fixing the boundary between two city lots under a plat made more than thirty years prior to the action, the corner stakes of which were lost, the court may properly take into consideration the question whether there is enough ground left in the block to fill out the full quota of lots, under the assumption that when the block was platted sufficient ground existed for each lot as platted. *Parks v. Newcomer*.... 646

3. BOUNDARIES (13)—LOCATION OF LINE—EVIDENCE—SUFFICIENCY. In an action to establish a boundary line between city lots, evidence that a line across the street had been established with reference to the disputed line while the latter was marked by a fence, though admissible, was not conclusive upon the question of the true line. *Parks v. Newcomer*..... 646

Bounties:

1. BOUNTIES—PERSONS ENTITLED. Under the soldiers' bonus act (Laws 1920, Ex. Sess., p. 7, § 1), any bona fide resident of the state who entered the military or naval service of the United States, abandoning civil life for the purpose of aiding the nation and the state in the emergency of the war with the central allied powers during the period between April 6, 1917, and November 11, 1918, and was actually on active service during such period, is entitled to the bonus, regardless of the time of entry in such service, if such entry resulted in the abandonment of the material advantages theretofore enjoyed by him in civil life. *Maximillian v. Clausen*.... 74

2. BOUNTIES—PERSONS ENTITLED—STATUTES—CONSTRUCTION. The soldiers' bonus act (Laws 1920, Ex. Sess., p. 7) providing for payment of equalized compensation to veterans of the war with the central allied powers who "were regularly called, enlisted, drafted, inducted or commissioned, and commissioned and who served on active duty between April 6, 1917, and November 11, 1918," contemplates payment to those only who were residents of the state and who between April 6, 1917, and November 11, 1918, abandoned the material advantages of civil life during such period to aid in the defense of their country. *Maximillian v. Clausen*..... 74

3. SAME—DUTIES OF STATE AUDITOR. It being the duty of the state auditor to pass upon application for a soldiers' bonus, when he determines the facts entitling the applicant to compensation, he must allow the same regardless of the time of entry into the service. *Maximillian v. Clausen*..... 74

Breach:

Restraining breach of contract, see INJUNCTION.
Of contract of sale, see SALES, 8, 9.
Of teacher's contract of employment, see SCHOOLS AND SCHOOL DISTRICTS, 2.

Breach of Marriage Promise:

1. BREACH OF MARRIAGE PROMISE (3)—ACTION FOR BREACH—DEFENSES—DISEASE AS JUSTIFICATION FOR BREACH. In an action for breach of promise of marriage, justification on the ground of defendant's being afflicted with tuberculosis was not established by testimony that he had gone to Arizona on that account, in the absence of any showing that, at the time of the alleged breach of promise, he was afflicted with pulmonary tuberculosis in its advanced stages. *Welker v. Wallace* 52

Brokers:

Parol evidence to vary contract for commissions, see EVIDENCE, 8.
Contracts for commissions as affected by statute of frauds, see FRAUDS, STATUTE OF, 2, 3.
Fraud of inducing sale of land, see VENDOR AND PURCHASER, 3, 5.

1. BROKERS (3, 28)—CONTRACT FOR COMMISSIONS—TERMINATION OF EMPLOYMENT—CANCELLATION OF EARNEST MONEY CONTRACT. An agreement to pay a broker's commission on a sale of real estate if completed under the terms and conditions of an earnest money contract, would not be defeated by the cancellation of the latter contract, where its terms are made part of the commission contract by reference and the canceled contract is still in existence and in evidence. *Lemcke Co. v. Nordby*..... 221

2. BROKERS (13)—COMPENSATION—PERFORMANCE OF CONTRACT OF EMPLOYMENT. A broker's commission on the sale of real property cannot be defeated on the ground of nonperformance of the contract exactly as made, where the change consisted in the purchaser paying a larger proportion of cash than originally agreed and making a corresponding diminution in the amount of security given for the balance of the purchase price. *Lemcke v. Nordby*.. 221

3. BROKERS (13)—COMPENSATION—PERFORMANCE OF CONTRACT OF EMPLOYMENT. Where, in a contract for the exchange of properties time is not the essence of a provision allowing either party thirty days to make good any defect in his title, a tender of a good title on the thirty-first day is sufficient, and a wrongful rejection of such tender would not defeat the broker's right to compensation promised him by the party who refused to perform the contract. *Grant v. Ten Hope* 531

4. BROKERS (14)—COMPENSATION—PERFORMANCE OF CONTRACT WITHIN TIME SPECIFIED. Where a broker is employed to procure a lease of certain land on or before a certain date, and is later refused an extension of the time limit in the proposal of employment, he is not entitled to commissions if the lease is not consummated until a month and a half later than the time limit and on terms differing from the proposition. *Davis & Co. v. Aabling*..... 579

Brokers—Continued.

5. BROKERS (19) — COMPENSATION — NEGOTIATIONS DIRECT WITH PRINCIPAL. A broker cannot recover commissions upon procuring a customer who is not willing to pay the price fixed, where a sale is made to such customer at a lower price after the expiration of the broker's employment, if the principal in good faith dealt with the purchaser in ignorance of the fact that he was the customer whom the broker had produced. *Swift v. Starrett*..... 188

6. BROKERS (27)—CONTRACT OF EMPLOYMENT—COMPENSATION—RATE OR AMOUNT. Where brokers are employed under a written contract to procure a loan in a stated amount for principal and interest, and subsequently, under an oral contract, are instrumental in procuring the loan for a less sum at a greater rate of interest, their compensation is measurable at the same rate as provided in the written contract, in the absence of any alteration by the terms of the oral understanding. *King v. Second Avenue Investment Co*..... 41

Buildings:

Regulation of buildings, see MUNICIPAL CORPORATIONS, 7.

Burden of Proof:

Harmless error in imposing burden of proof, see APPEAL AND ERROR, 17.
To show excessive rates for electric power, see ELECTRICITY, 1.
In action for royalties under mining lease, see MINES AND MINERALS, 1.
In action for damages from bursting of water meter, see MUNICIPAL CORPORATIONS, 18.
Payment of note, see PAYMENT, 2.
Good faith of trustee, see TRUSTS, 1.

Cancellation:

Of earnest money contract as affecting right to compensation, see BROKERS, 1.

Cancellation of Instruments:

Rescission of contract, see CONTRACTS, 4; SUBSCRIPTIONS.
Rescission of contract for mistake of fact, see EQUITY.
Rescission of contract for sale of land, see VENDOR AND PURCHASER, 1-5, 8.

Capital:

Of corporations in general, see CORPORATIONS, 1.

Carriers:

Delivery of goods to carrier as delivery to buyer, see SALES, 2-4.

1. CARRIERS (2)—WHO ARE COMMON CARRIERS—RAILROADS—POWERS OF PUBLIC SERVICE COMMISSION. The status of a carrier as a common carrier is a question of fact to be determined by the courts upon the evidence presented in the record, irrespective of the finding of the public service commission. *State ex rel. Silver Lake R. & L. Co. v. Public Service Commission*..... 453

2. SAME (2)—EFFECT OF CHARTER PROVISIONS. Power conferred on a corporation by its charter to perform service as a common carrier will not establish its character as a common carrier, where it has never undertaken to exercise that power. *State ex rel. Silver Lake R. & L. Co. v. Public Service Commission*..... 453

3. SAME (2) — EVIDENCE — SUFFICIENCY. The fact that a logging corporation brought an action to condemn land for a railroad right of way, while evidence to be considered, would not be sufficient in itself to establish a status as common carrier contrary to the actual facts. *State ex rel. Silver Lake R. & L. Co. v. Public Service Commission* 453

4. SAME (2). A logging and railway company organized for the purpose of getting out timber owned by the stockholders has no other status than that of a private carrier, where it does not carry on a general freight business but occasionally transports articles for others at less than the cost of service. *State ex rel. Silver Lake R. & L. Co. v. Public Service Commission*..... 453

5. CARRIERS (3-1) — REGULATION — OVERCHARGES—POWERS OF PUBLIC SERVICE COMMISSION. Where a carrier has agreed that a preferential tariff on carriage of freight shall apply to other shippers of the same commodity between points named, its published tariff is in effect replaced by a lower one, and a shipper who has been compelled to pay freightage according to the published tariff is damaged to the extent of the difference between the published tariff and the preferential rate accorded other shippers. *Tacoma Eastern R. Co. v. Public Service Commission*..... 609

6. CARRIERS (3-2)—COURTS (35)—PREVIOUS DECISIONS AS CONTROLLING—OVERCHARGES. Where, on a prior appeal, the law of the case has been decided as involving the measure of recovery for a violation by a carrier of the long and short haul provisions of the statute, the carrier cannot interpose an objection, in an action to recover upon an award made by the public service commission, that the shipper's case is one based upon discriminatory charges, thereby requiring a different measure of recovery. *Belcher v. Tacoma Eastern R. Co.* 512

Carriers—Continued.

7. CARRIERS (78-2, 88)—PERSONAL INJURIES—COLLISION WITH VEHICLE—OVERLOADING OR CROWDING CAR—QUESTION FOR JURY. While a carrier is not negligent in permitting a passenger, if he so chooses, to ride in a crowded car, yet a carrier's employees in charge of a car so crowded that passengers are obliged to stand, or occupy positions upon the platform or steps, are obliged to operate the car with due care in the light of those facts. *Carton v. Eyres & Seattle Drayage Co.* 536

8. SAME. Whether a passenger voluntarily chose to board a crowded street car and whether the car was thereafter operated with due care in the light of its crowded condition, are questions for the jury. *Carton v. Eyres & Seattle Drayage Co.*..... 536

9. SAME (102, 107)—OVERLOADING OR CROWDING CAR—PROXIMATE CAUSE OF INJURY—QUESTION FOR JURY. Whether the proximate cause of a passenger's injury was his position upon the steps of a street car, pressed so closely against the gate that he fell when the gate was torn off by a collision with a motor truck, is a question for the jury. *Carton v. Eyres & Seattle Drayage Co.*..... 536

Certificate:

Of corporate stock, see CORPORATIONS, 1.

Certiorari:

1. CERTIORARI (5)—WHEN LIES—INTERLOCUTORY ORDERS—APPEAL—FINAL ORDERS. An interlocutory order requiring the drawer of a trade acceptance to be made a party defendant to a suit by the assignee against the acceptor of the trade acceptance is not reviewable by certiorari in advance of the final judgment in the action. *State ex rel. Ladd & Tilton Bank v. Superior Court*.... 544

Charge:

To jury in civil actions, see TRIAL, 2-4.

Charges:

By carrier, see CARRIERS, 5, 6.
Regulation of rates for electric power, see ELECTRICITY.
Against executors and administrators in settlement of estate, see EXECUTORS AND ADMINISTRATORS, 10, 11.
Recovery of excessive charges, see TELEGRAPHS AND TELEPHONES.

Chattel Liens:

See LIENS.

Child:

Modification of decree awarding custody of child, see DIVORCE, 4, 5.

Chose in Action:

Assignment of, see ASSIGNMENTS, 3.

Cities:

See MUNICIPAL CORPORATIONS.

Civil Service:

Application to municipal agents and employees, see MUNICIPAL CORPORATIONS, 2.

Claim and Delivery:

See REPLEVIN.

Claims:

Assigned claims, see ASSIGNMENTS.
Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 9, 11.
Of homestead, time for making, see HOMESTEAD, 3, 4.
Against municipal corporations, see MUNICIPAL CORPORATIONS, 20, 22.
Of administrator, duty to cancel under provisions of will, see WILLS, 4.

Collateral Undertaking:

See FRAUDS, STATUTE OF, 1.

Collision:

Of street car with vehicle, see CARRIERS, 7-9.
With automobile on highway, see HIGHWAYS, 4-6.
Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 10-15.
Between street cars or with vehicles, see STREET RAILROADS, 2-4.

Commerce:

Carriage of goods and passengers, see CARRIERS.
Contracts in restraint of trade, see CONTRACTS, 3.

Commissioners:

Appeals from acts of county board, see APPEAL AND ERROR, 1.

Commissions:

Of broker, see BROKERS.

Common Carriers:

See CARRIERS.

Community Property:

See HUSBAND AND WIFE, 3, 5.

Comparison:

To authenticate letter as evidence, see EVIDENCE, 4.

Compensation:

Rights of surviving parent under soldiers' bonus act, see ARMY AND NAVY.
Of attorney, see ATTORNEY AND CLIENT, 2; TRUSTS, 2.
Persons entitled under soldiers' bonus act, see BOUNTIES.
Of broker, see BROKERS.
Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.
For property taken for public use, see EMINENT DOMAIN, 2.
Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 12, 13.
For use of money, see INTEREST.
Of state officers, see STATES, 1.
Attorney's fees in will contest, see WILLS, 2.

Competency:

Of evidence in civil actions, see EVIDENCE, 3.
Of witnesses in general, see WITNESSES, 1.

Competition:

Contracts preventing competition in trade, see CONTRACTS, 3.

Complaint:

In civil action, see PLEADING, 1.

Compromise and Settlement:

See ACCORD AND SATISFACTION.
Admissibility of offers to compromise, see EVIDENCE, 2.

Computation:

Of interest, see INTEREST, 2.

Conclusion:

Of witness, see EVIDENCE, 9.

Conclusiveness:

Of award, see ARBITRATION AND AWARD.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Condition:

Precedent to foreclosure of tax certificate, see TAXATION, 8.

Conditional Sales:

See SALES, 10, 11.

Conditions:

On redemption from foreclosure sale, see MORTGAGES, 4.

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Misconduct in separation of jury, see TRIAL, 5.

Consent:

Of owner as affecting right to lien, see LIENS, 1.

Consideration:

Of accord and satisfaction, see ACCORD AND SATISFACTION, 2.
Of bill of exchange or promissory note, see BILLS AND NOTES, 5.
For deed, see DEEDS, 2.
Of fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2.
Of subscription, see SUBSCRIPTIONS.

Constitutional Law:

Increase of officer's salary, see STATES, 1.
Subjects and titles of statutes, see STATUTES, 2.
Equality and uniformity in taxation, see TAXATION, 1.

1. CONSTITUTIONAL LAW (144)—CRIMINAL LAW (395)—APPEAL—RIGHTS OF ACCUSED—PAYMENT OF FEES OR COSTS—LIABILITY OF COUNTY. One convicted of crime upon a trial in the superior court cannot require the public treasury to defray the cost of his appeal from the judgment under Const., art. 1, § 22, defining the right of appeal and providing that "in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed," since the "final judgment" therein referred to means the judgment of the superior court. *State ex rel. Mahoney v. Ronald*..... 641

Construction:

Of stipulation in note for payment of attorney's fees, see BILLS AND NOTES, 1.
Of soldiers' bonus act, see BOUNTIES.
Of homestead laws, see HOMESTEAD, 1.
Of accident policy, see INSURANCE, 2.
Of contract of sale, see SALES, 1.
Of statutes, see STATUTES, 4.
Of will, see WILLS, 4.

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Of will, see WILLS, 2.

Contracts:

See ACCORD AND SATISFACTION; SUBSCRIPTIONS.
Agreement to arbitrate, see ARBITRATION AND AWARD.
Assignment, see ASSIGNMENTS.
Bailment, see BAILMENT.
Promise of marriage, see BREACH OF MARRIAGE PROMISE.
Compensation of broker, see BROKERS.
Subscription to corporate stock, see CORPORATIONS, 1.
Election of remedy for breach, see ELECTION OF REMEDIES.
Rescission for mistake of fact, see EQUITY.
Parol evidence to vary written contract, see EVIDENCE, 5-8.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of married women, see HUSBAND AND WIFE, 1, 2.
Restraining breach of, see INJUNCTION.
Of insurance in general, see INSURANCE.
Limitation of action on implied contracts, see LIMITATION OF ACTIONS.
Novation, see NOVATION.
Sales of personalty, see SALES.
Right of teacher to bring action for breach of, see SCHOOLS AND SCHOOL DISTRICTS, 2.
Sale of land, see VENDOR AND PURCHASER.
Rescission of sale of land, see VENDOR AND PURCHASER, 1-5, 8.

1. CONTRACTS (4)—MUTUALITY. A contract whereby one party agrees to haul and warehouse fruit grown by the other party is void for lack of mutuality, where the grower is not by its terms bound to deliver any given quantity of fruit. *Brewster District Unit v. Monroe* 21

2. CONTRACTS (40)—VALIDITY. A contract to purchase delinquency certificates expressly authorized by statute is not invalid. *Fidelity Securities Co. v. Dickinson*..... 323

3. CONTRACTS (45)—MONOPOLIES—VALIDITY—RESTRAINT OF TRADE—CONTROLLING PRODUCTION AND PRICE OF COMMODITY. A contract requiring a grower of cranberries to ship all the crop grown by him to an association for the purpose of marketing and sale with the object of enabling the growers to obtain a uniform price for their product, but which does not operate to limit production or control the price in any particular locality, is not void as against public policy, nor as contravening art. 12, § 22, of the state constitution against monopolies, nor the Federal anti-trust act. *Washington Cranberry Growers Ass'n v. Moore*..... 430

4. CONTRACTS (116) — RESCISSION — MISTAKE OF FACT — EVIDENCE—SUFFICIENCY. Where, as part of the agreement for a bank's taking over the assets and liabilities of another bank in straitened circumstances, it was agreed by the president of the former bank to buy

Contracts—Continued.

the stock of the principal shareholder of the embarrassed bank, but, owing to the discovery of a heavy defalcation of the latter's funds, the original agreement for the transfer was rescinded and a new agreement made, the contract for sale of the principal shareholder's stock was such a part of the rescinded contract as to be likewise subject to rescission. *Lindeberg v. Murray*..... 483

Contributory Negligence:

Of driver of automobile, see HIGHWAYS, 4, 5; RAILROADS, 3, 4; STREET RAILROADS, 3, 4.

Conveyances:

See ASSIGNMENTS.
In general, see DEEDS.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
As security for debt, see MORTGAGES.
Mortgaged property, see MORTGAGES, 1-3.
Bill of sale, see SALES, 10.
Of personal property as affecting tax lien, see TAXATION, 4, 5.
To effect testator's intent, see WILLS, 3.

Corporations:

See MUNICIPAL CORPORATIONS.
Competency of stockholder to testify in action in which corporation is interested, see WITNESSES, 1.

1. CORPORATIONS (49)—STOCK—ISSUANCE OF CERTIFICATE—PERSONS ENTITLED AND REMEDIES—CONVERSION. Where a receipt for payment of a subscription to capital stock recited the stock was "to be issued as soon as stock book has been opened," it was, in legal effect, a promise given and accepted that, as soon as the stock book was opened, a certificate would be issued, and in the absence of a demand and refusal of a certificate at any subsequent date, no action against the corporation for conversion of the stock will lie. *Ophir Investment Co. v. Alexander Realty Corporation*..... 637

2. CORPORATIONS (125, 128)—OFFICERS—ACQUIRING ADVERSE INTERESTS—DEALINGS WITH CORPORATION—STOCK HELD IN TRUST. An officer and stockholder in a mining corporation, who acquires an adjacent tract of land for mining purposes while acting in his own interest and not for the benefit of his corporation nor by the use of any of its funds, does not hold as trustee for his corporation, since there is no violation of any specific duty owed by him to it. *Bancroft v. Olympia Coal & Mining Co*..... 211

Costs:

Statutory requirements as to costs as denial of right to justice, see CONSTITUTIONAL LAW.

Mandamus to compel allowance of cost bill, see MANDAMUS, 2.

1. COSTS (47)—COUNTIES (52)—EXPENSES AND CHARGES—LIABILITY FOR STENOGRAPHER'S FEES—STATUTES. Under Laws 1917, ch. 115, § 18, where an investigation is held by the state board of law examiners upon the application of an attorney to admission to practice in the state, the county is liable for the stenographer's fees and costs of the investigation, subject to the approval of the items thereof by the court or presiding judge of the county. *State ex rel. Royse v. Superior Court* 3

Counsel:

See ATTORNEY AND CLIENT.

Counties:

Appeals from acts of county board, see APPEAL AND ERROR, 1.

Liability for cost of criminal appeal, see CONSTITUTIONAL LAW.

Liability for stenographer's fees incurred by state board of law examiners, see COSTS.

Establishment of drains, see DRAINS.

Assessments for highway purposes, see HIGHWAYS.

Mandamus to compel officers to repair road, see MANDAMUS, 3.

County Board:

Appeals from acts of, see APPEAL AND ERROR, 1.

Courses and Distances:

See BOUNDARIES.

Courts:

Review of decisions, see APPEAL AND ERROR.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 24, 25; CARRIERS, 6.

Admission to practice law, see ATTORNEY AND CLIENT.

Stenographer's fees as costs, see COSTS.

Appointment of administrator, see EXECUTORS AND ADMINISTRATORS, 1-3.

Review of assessment under Donohue road law, see HIGHWAYS.

Judgment *non obstante veredicto*, see JUDGMENT, 1-3.

Conclusiveness of judgments, see JUDGMENT, 7, 8.

Mandamus to inferior courts, see MANDAMUS, 1, 2.

Courts—Continued.

Review of action removing civil service employee, see MUNICIPAL CORPORATIONS, 2.

To restrain wrongful enforcement of taxes, see TAXATION, 11.

1. COURTS (35)—PREVIOUS DECISIONS AS CONTROLLING—STARE DECISIS. Where the offer of a carrier to refund overcharges to shippers of lumber on the basis of a preferential rate given one shipper has been adopted as a rule by the public service commission and upheld by the courts in the case of all shippers similarly situated, the question has practically become *stare decisis*. *Tacoma Eastern R. Co. v. Public Service Commission*..... 609

Credit:

On partial release of mortgage, see MORTGAGES, 3.

Creditors:

See FRAUDULENT CONVEYANCES.

Criminal Law:

Offenses by bank officers, see BANKS AND BANKING, 1.

Right of accused to require county to defray costs of appeal, see CONSTITUTIONAL LAW.

Trial of civil actions, see TRIAL.

1. CRIMINAL LAW (137) — EVIDENCE — HEARSAY — DECLARATIONS BY THIRD PERSONS. Where testimony concerning the purposes, objects, principles, and teachings of the I. W. W. organization is limited to the acts and sayings of organizers or delegates at recognized meetings or places of assemblage of the organization, upon occasions sanctioned or directed by it, the evidence is not open to the objection of being hearsay. *State v. Passila*..... 295

2. SAME (182)—EVIDENCE—SUFFICIENCY—PLACE OF COMMISSION OF OFFENSE AND VENUE. Prosecution for criminal syndicalism may properly be maintained in the county of defendant's residence though he was arrested while temporarily at work in another county. *State v. Passila*..... 295

3. CRIMINAL LAW (183)—EVIDENCE—IDENTITY OF ACCUSED. In a prosecution of foreign born persons for criminal syndicalism, confusion as to how their last names are spelled is immaterial, where their first names are sufficiently clear, and they were identified before the jury as the parties charged. *State v. Passila*..... 295

Criminal Syndicalism:

Evidence in prosecution of offense, see CRIMINAL LAW.

Crossings:

Accidents at street crossings, see MUNICIPAL CORPORATIONS, 10, 11, 13.
Accidents at railroad crossings, see RAILROADS, 3, 4.

Custody:

Support and custody of children, see DIVORCE, 4, 5.

Damages:

Condemnation of property taken for public use, see EMINENT DOMAIN, 2.
Recovery for breach of contract, see INJUNCTION.
Injuries from public improvements, see MUNICIPAL CORPORATIONS, 3.
Claims against city for, see MUNICIPAL CORPORATIONS, 20-22.
For breach of contract for sale of goods, see SALES, 8, 9.
Breach by vendor of contract for sale of land, see VENDOR AND PURCHASER, 10.

1. DAMAGES (81)—PERSONAL INJURIES—EXCESSIVE VERDICT. A judgment for $7,500 for personal injuries is excessive, and plaintiff should be required to remit $2,500, where the evidence shows he suffered no permanent injury, but is suffering from traumatic neurasthenia, which prevents his working full time. *Carton v. Eyres & Seattle Drayage Co*..... 536

2. DAMAGES (109)—EVIDENCE—PHYSICAL CONDITION OF PERSON INJURED—ADMISSIBILITY. Evidence of the neurasthenic condition of plaintiff in an action for damages for personal injury was admissible under allegations of the complaint that injury to his head has caused him great pain; that he has suffered from loss of memory and his eyesight and hearing have been affected; that ever since the accident he has been incapable of mental activity, and suffers from despondency, mental and physical depression, and insomnia. *Carton v. Eyres & Seattle Drayage Co*..... 536

3. DAMAGES (124, 126)—ASSESSMENT—INJURY TO PERSON—INSTRUCTIONS. Where there is some evidence of future pain and suffering or impairment of the faculties of plaintiff in a personal injury action, an instruction on the rule for assessing damages which states the jury might allow compensation for pain and suffering which is reasonably certain to endure in the future was proper. *Surry v. Seattle Taxicab Co*..... 559

4. DAMAGES (126)—MEASURE OF DAMAGES—MENTAL SUFFERING AND EXPENSES INCURRED—INSTRUCTIONS. In an action for personal injuries, an instruction including mental suffering and hospital bills as elements of damages is erroneous, in the absence of pleading and proof thereon. *Gosa v. Hyde*..... 672

Death:

Of party as ground for abatement, see ABATEMENT AND REVIVAL, 2.
Of grantee before delivery of deed, see DEEDS, 1.
Of insured by "external, violent and accidental means," see INSURANCE, 2.

Debt:

Validity of oral promise to pay debt of another, see FRAUDS, STATUTE OF, 1.
Contracts of wife, see HUSBAND AND WIFE, 1, 2.

Debtor and Creditor:

See FRAUDULENT CONVEYANCES; GARNISHMENT.
Right to claim homestead exemption, see HOMESTEAD.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.
Testimony as to transactions with persons since deceased, see WITNESSES, 1.

Deceit:

See FRAUD.

Decision:

Review on appeal, see APPEAL AND ERROR, 1, 2.
Former decision as law of case, see APPEAL AND ERROR, 24, 25.
On appeal, see APPEAL AND ERROR, 26.
Former decisions as controlling, see CARRIERS, 6; JUDGMENT, 7, 8.
Decision of courts in general, see COURTS.

Declarations:

As evidence in criminal prosecutions, see CRIMINAL LAW, 1.
As evidence in civil actions, see EVIDENCE, 3.
Of homestead, see HOMESTEAD, 3-5.

Deeds:

In fraud of creditors, see FRAUDULENT CONVEYANCES, 2.
Tax deeds, see TAXATION, 9, 10.
To effect testator's intent, see WILLS, 3.

1. DEEDS (3) — PARTIES — DEATH OF GRANTEE BEFORE DELIVERY. Deeds executed pursuant to a contract to a grantee in ignorance of his death will be treated in equity as a deed to his estate. *Fidelity Securities Co. v. Dickinson*..... 323

2. SAME (55)—EVIDENCE—CONSIDERATION. Where negotiations for a conveyance are conducted by a father and a deed is executed to his daughter as grantee, the presumption, in the absence of evidence, is that the consideration was paid by the daughter. *Fidelity Securities Co. v. Dickinson*..... 323

Defect:

In goods sold, see SALES, 7.

Delivery:

Of goods sold, see SALES, 2-4, 8, 9.
Of bill of lading, see SALES, 3.

Demand:

For bill of particulars, see PLEADING.

Demurrer:

As waiver of right to deny allegations of petition to vacate decree, see DIVORCE, 2.

Description:

Of boundaries in notice of hearing on petition to incorporate town, see MUNICIPAL CORPORATIONS, 1.
In claim of defect causing injury, see MUNICIPAL CORPORATIONS, 20.

Desertion:

Ground for recovery of alimony or separate maintenance, see HUSBAND AND WIFE, 6.

Devise:

See WILLS.

Diligence:

Notice to owner of tax sale, see TAXATION, 6.

Disbursements:

By administrator for benefit of estate, see EXECUTORS AND ADMINISTRATORS, 11.

Discharge:

From indebtedness, see ACCORD AND SATISFACTION.
Of administrator, see EXECUTORS AND ADMINISTRATORS, 2.
School teacher, see SCHOOLS AND SCHOOL DISTRICTS.

Discretion:

Mandamus to control acts involving discretion of officers, see MANDAMUS, 3.

Discretion of Court:

Review in civil actions, see APPEAL AND ERROR, 12.
To modify decree awarding custody of child, see DIVORCE, 5.
Review of ruling on motion for new trial, see EMINENT DOMAIN, 3.
Limiting number of witnesses, see TRIAL, 1.

Dismissal and Nonsuit:

1. DISMISSAL AND NONSUIT (11)—SETTING ASIDE AND REINSTATEMENT. Motion for reinstatement of an action, dismissed for failure to file a cost bond, is the proper remedy where plaintiff either had no notice of the application for the bond, or had a valid excuse due to poverty induced by illness. *Harringer v. Keenan* 311

2. SAME. A motion to reinstate a cause of action which had been improperly dismissed does not necessitate a showing of a meritorious cause of action, since the cause of action necessarily appears in the complaint. *Harringer v. Keenan*..... 311

Ditches:

See DRAINS.

Divorce:

Actions for separate maintenance, see HUSBAND AND WIFE, 6.
Annulment of marriage, see MARRIAGE, 2.
Prejudice of trial judge as ground for new trial, see NEW TRIAL, 1.

1. DIVORCE (8)—GROUNDS—INABILITY TO LIVE TOGETHER. Extravagance on the part of the wife and incompatibility in the temperament of the spouses are insufficient grounds for decreeing a divorce to a husband. *Motley v. Motley*..... 234

2. DIVORCE (47, 47-1)—VACATION—JURISDICTION—FRAUD—PETITION—PROOF OF ALLEGATIONS—WAIVER. On a petition by a wife to set aside a divorce decree in favor of the husband on the ground it was procured by fraud, to which the husband demurred on the ground it did not state facts sufficient, such demurrer constituted a waiver of the constructive denial afforded by Rem. Code, § 468, and an admission on his part of the truth of the allegations of the petition, warranting the action of the court in setting aside the decree on his refusal to plead further. *Meeker v. Meeker*..... 410

3. DIVORCE (49)—DECREE—ACTION TO VACATE—FRAUD—PROCEEDINGS. A petition to set aside a judgment on the ground it was procured by fraud is properly filed in the original cause, under the provisions of Rem. Code, §§ 466-469. *Meeker v. Meeker*..... 410

4. DIVORCE (104)—CUSTODY OF CHILD—MODIFICATION OF DECREE—EVIDENCE—FITNESS OF PARENT. On an application for a modification of a divorce decree awarding the custody of a minor child, evidence on the subject of the competency of the mother, as custodian, relating to a period preceding the decree of divorce, is inadmissible. *Earling v. Earling* 584

5. SAME (104) — CUSTODY OF CHILD — MODIFICATION OF DECREE—CHANGED CONDITIONS—DISCRETION OF COURT. An order awarding the custody of a minor child to each of divorced parents for alternate periods of six months, subsequently changed on the child's becoming

Divorce—Continued.

of school age by awarding the entire custody to the mother, should be modified, where each parent is fit and able to care for the child, to permit the father to have the custody during any substantial period when he is not in school, not exceeding six months in any one year. *Earling v. Earling*..... 584

Documents:

As evidence in civil actions, see EVIDENCE, 4.

Drains:

Condemnation of property for drainage purposes, see EMINENT DOMAIN, 2.

Regulating drainage of basements as exercise of police power, see MUNICIPAL CORPORATIONS, 7.

Effect of non-enforcement of ordinance relating to drainage of basements, see MUNICIPAL CORPORATIONS, 16.

1. DRAINS (9)—PROCEEDINGS—DEFENSES—EFFECT OF INJUNCTION. A judgment enjoining a county from proceeding with the construction of a longitudinal drainage ditch along a highway on the ground that it would be an additional servitude necessitating condemnation does not preclude the county from proceeding to condemn a right of way for such ditch under the authority conferred by Laws 1921, ch. 160, § 3. *Gray v. Ramsay*..... 255

Ejectment:

Recovery of leased premises, see LANDLORD AND TENANT, 2, 3.

Election of Remedies:

By injured workman, see MASTER AND SERVANT, 1.

Action on note as waiver of right to retake property under conditional sale contract, see SALES, 11.

1. ELECTION OF REMEDIES (3)—ACTS CONSTITUTING—PLEADING—CAUSES OF ACTION—DAMAGES FOR BREACH OF MINING LEASE. In an action for mining royalties, a requested instruction that plaintiffs could not recover therefor subsequent to the date of commencement of the action since they had elected to treat the contract as breached on that date, was properly refused where an amended complaint was filed nearly two years later claiming royalties up to the time of its filing. *Oliver v. Polson*..... 385

Electricity:

1. ELECTRICITY (1)—REGULATION OF RATES—REASONABLENESS—EVIDENCE TO SUSTAIN INCREASE—SUFFICIENCY. Where complaint is not made against a new tariff of rates by a public service corporation until after it had become effective, the burden of proof rests upon the complainant to show that the rates are unreasonable. *North Coast Power Co. v. Kuykendall*..... 563

Electricity—Continued.

2. SAME (1)—RATES—REASONABLENESS—EVIDENCE. A tariff rate for electric power showing a net earning of 4.12 per cent on the capital invested in the service of providing power is not unreasonable, where the evidence shows the value of the service is worth its cost to the consumer. *North Coast Power Co. v. Kuykendall*..... 563

3. SAME. The rule that a public service corporation may be compelled to furnish certain users service at a loss where its total business produces a fair return on the investment does not apply where there is no evidence of any adequate net earning on the entire business. *North Coast Power Co. v. Kuykendall*..... 563

4. SAME. The fact that diking district budgets for expenses of the ensuing year had been made without anticipating a raise in electric power rates would not constitute a showing of imposition of rates beyond the consumer's ability to pay, since such ability rests on their actual financial resources and not upon an appropriation of funds to meet expenses. *North Coast Power Co. v. Kuykendall* 563

5. SAME. The question of whether rates for electric power charged by a corporation are just, fair, reasonable and sufficient is not dependent upon the facts that the consumers made contributions toward the construction of the power plant, and that the corporation solicited the business of the consumers. *North Coast Power Co. v. Kuykendall* 563

Emergency:

Care required of driver of automobile, see MUNICIPAL CORPORATIONS, 15.

Eminent Domain:

Construction of drainage ditch, see DRAINS.

1. EMINENT DOMAIN (39)—NECESSITY FOR APPROPRIATION—EVIDENCE—SUFFICIENCY. Necessity for the appropriation of land for a public highway is established in condemnation proceedings by evidence showing the purpose is to avoid two bad curves, thereby decreasing the length of the highway, preventing bad curvature, and avoiding considerable congestion. *State ex rel. Hanson v. Superior Court* 399

2. EMINENT DOMAIN (62)—CONSTRUCTION IN HIGHWAY—ADDITIONAL SERVITUDE—DAMAGES—RIGHTS OF ABUTTING OWNERS. The construction of an open ditch ten feet in width along a public highway for the purpose of draining private property is an additional servitude for which the abutting owners are entitled to compensation, under art. 1, § 16, of the constitution prohibiting the taking or damaging of private property without first making just compensation. *Gray v. Ramsay*..... 255

Eminent Domain—Continued.

3. EMINENT DOMAIN (156)—APPEAL (406)—REVIEW—DISCRETION—NEW TRIAL FOR EXCESSIVE DAMAGES. The trial of condemnation proceedings by a city, including motions for a new trial, being governed, under Const., art. 1, § 16, and Rem. Code, § 7779, by the same rule as in other civil actions, the appellate court is confined to a determination whether the trial court abused its discretion in passing on the motion for a new trial. *In re Skagit River Power Site*..... 368

Employees:

See MASTER AND SERVANT.
Removal of civil service employees, see MUNICIPAL CORPORATIONS, 2.

Equal Protection of Laws:

See TAXATION, 1, 2.

Equity:

See FRAUDULENT CONVEYANCES; INJUNCTION; TRUSTS.
Enjoining collection of tax, see TAXATION, 11.
Necessity for findings in equity case, see TRIAL, 6.

1. EQUITY (6)—GROUNDS FOR RELIEF—MISTAKE OF FACTS—RESCISSION OF CONTRACT. The true test in cases involving mutual mistake of fact being whether the contract would have been entered into had there been no mistake, a contract is subject to rescission, where there is a clear *bona fide* mistake regarding material facts, without culpable negligence on the part of the person complaining. *Lindeberg v. Murray*..... 483

Establishment:

Of boundaries, see BOUNDARIES.
Of drains, see DRAINS.
Of trusts, see TRUSTS, 3, 4.

Estates:

Of deceased persons, see EXECUTORS AND ADMINISTRATORS.
Interests of parties under mortgage, see MORTGAGES.
Trust estates, see TRUSTS.

Estoppel:

To object to failure to file statement of facts in time, see APPEAL AND ERROR, 8.
Of parties by assignment of claim, see ASSIGNMENTS, 2, 3.
By judgment, see JUDGMENT, 7, 8.
To rescind contract for sale of land, see VENDOR AND PURCHASER, 4.

Evidence:

See ACCORD AND SATISFACTION, 1.
Review of rulings as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 3.
Presumptions on appeal, see APPEAL AND ERROR, 11.
Harmless error on appeal, see APPEAL AND ERROR, 18-20.
To vary item of award, see ARBITRATION AND AWARD.
On bill or note, see BILLS AND NOTES, 6.
To establish boundaries, see BOUNDARIES, 2, 3.
For breach of marriage promise, see BREACH OF MARRIAGE PROMISE.
That railroad is common carrier, see CARRIERS, 2-4.
To rescind contract on ground of mistake, see CONTRACTS, 4.
In criminal prosecutions, see CRIMINAL LAW.
Physical condition of person injured, see DAMAGES, 2.
Presumptions as to payment of consideration, see DEEDS, 2.
As to fitness of parent to have custody of child, see DIVORCE, 4.
Reasonableness of rates for electric power, see ELECTRICITY.
Necessity for taking land for public highway, see EMINENT DOMAIN, 1.
In action for fraud, see FRAUD, 2, 3.
To set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2.
Negligent use of highways, see HIGHWAYS, 6.
Separate property of married woman, see HUSBAND AND WIFE, 1.
In action for alienation of affections, see HUSBAND AND WIFE, 7-10.
Cause of death in action on life insurance policy, see INSURANCE, 2, 3.
To sustain judgment *non obstante veredicto*, see JUDGMENT, 1-3.
Of modification of rental charge in lease, see LANDLORD AND TENANT, 1.
In action for unlawful detainer by tenant, see LANDLORD AND TENANT, 2.
Payment of debt, see LIENS, 5.
Of marriage, see MARRIAGE, 1.
For injuries to servant, see MASTER AND SERVANT, 2, 3.
In action to recover royalties under coal mining lease, see MINES AND MINERALS, 1.
For injuries in streets, see MUNICIPAL CORPORATIONS, 12, 13, 15.
Verdict or findings contrary to evidence, see NEW TRIAL, 2-4.
Newly discovered evidence as ground for new trial, see NEW TRIAL, 5.
Of public necessity for track connection between two railroads, see RAILROADS, 1, 2.
In replevin, see REPLEVIN.
For price of goods sold, see SALES, 7.
Reception at trial, see TRIAL, 1.
Applicability of instructions to evidence, see TRIAL, 3.
Burden of proof as to good faith in transactions between trustee and *cestui que trust*, see TRUSTS, 1.

Evidence—Continued.

Of fraud inducing exchange of properties, see VENDOR AND PURCHASER, 3.

To warrant change of location of water mains in city street, see WATERS AND WATER COURSES.

Mistake, undue influence, or fraud in making or procuring will, see WILLS, 1.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE (64)—REMOTENESS. In a personal injury action, testimony as to an injury to plaintiff's back, though indefinite, is not subject to be stricken on the ground of remoteness. *Poole's Seed & Implement Co. v. Rudene*..... 150

2. EVIDENCE (86)—ADMISSION—OFFER OF COMPROMISE—IMPLIED RECOGNITION. An offer to pay the cost of repairs for injuries to an automobile, though not admissible in evidence as an offer of compromise, is admissible as impliedly recognizing the liability of the one making the offer. *Poole's Seed & Implement Co. v. Rudene* 150

3. EVIDENCE (104)—HEARSAY—DECLARATION OF THIRD PERSONS—ADMISSIBILITY. Under the rule that evidence of matters of general reputation or notoriety is not hearsay, it was competent, upon an issue as to the standing of a directory of musicians among musicians, for one of that class to testify that the directory had no standing, though his knowledge was based on inquiry among musicians. *Horowitz v. Kuehl*..... 16

4. EVIDENCE (130, 139)—DOCUMENTARY EVIDENCE — LETTERS — AUTHENTICATION. Letters by a wife to defendant in an action for alienation of affections are properly admitted in evidence where their authorship is demonstrated by comparison with the admittedly genuine handwriting of the wife. *Harringer v. Keenan*.. 311

5. EVIDENCE (157) — MORTGAGES (102) — ASSUMPTION OF MORTGAGE DEBT—PAROL EVIDENCE TO VARY WRITING. An oral agreement by the grantee of mortgaged premises to assume a mortgage thereon is not merged in the executed deed, but is enforcible as a contract independent of and additional to it, and hence is not within the rule against varying or adding to a written contract by parol testimony. *Bollong v. Corman*..... 336

6. EVIDENCE (158)—TO VARY WRITING — EXISTENCE OF CONDITION. In an action on notes given for the purchase price of goods, evidence that the seller orally agreed as a part of the order to make shipment in time for the Christmas trade was inadmissible as tending to vary the written agreement, and also because not accompanied by an offer to show that a loss was suffered thereby. *National Finance Co. v. Emerson*..... 297

Evidence—Continued.

7. EVIDENCE (168)—PAROL TO VARY WRITING—PRIOR OR CONTEMPORANEOUS AGREEMENTS. Where a written contract for the hauling and storage of fruit is void for want of mutuality, oral evidence is inadmissible to show that an agreement was made, at or before the time of the writing, that the grower bound himself to deliver all the fruit of the crop for a given year. *Brewster District Unit v. Monroe* 21

8. EVIDENCE (173)—PAROL EVIDENCE TO VARY WRITING—RELATION OF ORAL AGREEMENT TO WRITING. Where a broker's contract for a commission had alternative provisions, one in writing and one oral, which were not inconsistent, evidence of the oral stipulation is not contradictory of the written stipulation. *King v. Second Avenue Investment Co.* 41

9. EVIDENCE (197)—OPINION EVIDENCE—BODILY APPEARANCE OR CONDITION. In an action to recover damages for being run into by a motor truck, it is error to allow a doctor, who had examined plaintiff after the accident, to testify she had been first struck at a discolored place on her back, where the evidence shows there were a number of other discolorations and bruises upon the body. *Eddy v. Spelger & Hurlbut* 632

Examination:

Of witnesses in general, see WITNESSES.

Exceptions:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 5.

To instructions, see TRIAL, 4.

Excessive Charges:

See TELEGRAPHS AND TELEPHONES.

Exchange of Property:

Rescission by purchaser for fraud, see VENDOR AND PURCHASER, 3, 5.

Execution:

Exemptions from execution and protection of rights of exemption, see EXEMPTIONS.

Exemptions from execution of real property as homestead, see HOMESTEAD.

Executive Construction:

As aid to statutory construction, see STATUTES, 4.

Executors and Administrators:

Time for commencement of action against estate, see ACTION, 2.

Rights of devisee or legatee as against executor, see WILLS, 4.

Executors and Administrators—Continued.

1. EXECUTORS AND ADMINISTRATORS (8, 13) — APPOINTMENT — DISQUALIFICATIONS—STATUTES—CONSTRUCTION. In appointing an administrator of a decedent's estate the court acts judicially, and, if it finds that an applicant who has a prior right of appointment under the order prescribed by Laws 1917, ch. 156, § 61, is unfit to be trusted with the funds of the estate, the court is justified in denying his application for letters. *In re Langill's Estate*..... 268

2. EXECUTORS AND ADMINISTRATORS (10, 13)—RIGHT TO APPOINTMENT —QUALIFICATIONS. The preference right of the husband to appointment as administrator upon the community property upon the death of his wife, under Laws 1917, ch. 156, § 49, is forfeitable for fraud, where he procures his appointment with knowledge of the existence of a will by his wife, but falsely swears there is no will, with the intent of acquiring a greater share of the estate than he would be entitled to under the will. *In re Bredl's Estate*..... 372

3. SAME (13). While the preference right under statute to administer upon an estate is a valuable right, it is not an absolute right, and does not require that the court shall appoint one who has given evidence of dishonesty of purpose in seeking the appointment, or who in other respects has betrayed gross unfitness for the trust. *In re Bredl's Estate*..... 372

4. SAME (45)—MANAGEMENT OF ESTATE—PERSONAL PROFIT—POSSESSION OF PROPERTY. Where, under the terms of a will and by agreement of the beneficiaries, an administrator, who had been given a life estate in a tract of land, had gone into possession and personally profited thereby, such fact could not be urged as an objection against his final account. *In re Adin's Estate*..... 693

5. EXECUTORS AND ADMINISTRATORS (58, 59)—ALLOWANCE TO SURVIVING WIFE—MAINTENANCE OF "FAMILY" — STATUTES — CONSTRUCTION. Under Laws 1917, ch. 156, §§ 103, 104, providing for a homestead to a surviving spouse not exceeding in value $3,000 out of either separate or community property, and that in case a homestead had been selected, not exceeding $2,000 in value, the court shall award the surviving spouse other property so that the total value of homestead and other property shall not exceed $3,000, which shall be free from further administration, a widow to whom had been devised the equity in their home worth $1,370.63, and household furniture worth $300, was entitled to an award of a money judgment against the estate sufficient to bring her allowance to $3,000, notwithstanding she was made a residuary legatee to a one-third interest in property of the value of $6,468.75. *In re Hooper's Estate*..... 463

6. SAME (58, 59). Under Laws 1917, ch. 156, § 106, providing for a further reasonable allowance of cash out of an estate as may be necessary for the maintenance of the family during the settlement

Executors and Administrators—Continued.

of the estate, a surviving wife is entitled to such allowance, though there are no minor children or other dependents on her. *In re Hooper's Estate* 463

7. SAME (59). A widow constitutes a "family" upon the death of her husband, though she is without children or may have children all of age. *In re Hooper's Estate*..... 463

8. SAME (62)—SUPPORT OF FAMILY—STATUTES—CONSTRUCTION. Statutes providing for allowances to the survivor of a decedent are strongly favored in law, rest in sound public policy, and should be liberally construed. *In re Hooper's Estate*..... 463

9. EXECUTORS AND ADMINISTRATORS (72, 76) — CLAIMS — ACCRUING DURING ADMINISTRATION. The statute of non-claim barring all claims not presented within six months after publication of notice to creditors of a decedent's estate has no application to a claim for legal services rendered the estate during the course of administration, whereby additional assets are discovered and added to the estate. *Drain v. Wilson* 34

10. EXECUTORS AND ADMINISTRATORS (158)—SETTLEMENT AND ACCOUNTING—USE AND OCCUPATION OF PREMISES. An objection to the final account of an administrator on the ground that the expenses of administration were not a pro rata charge against the devisees, legatees and beneficiaries is not well taken, where the will expressly provided the charges should be prorated, and such charges were necessarily incurred and paid by the administrator, and were less in amount than if the fees due the administrators, but not charged, had been included. *In re Adin's Estate*..... 693

11. EXECUTORS AND ADMINISTRATORS (159-1)—ACCOUNTING—DISBURSEMENTS—LAST SICKNESS—PROVISIONS OF WILL. A will providing that a named beneficiary should take nothing thereunder, until he should execute a release and acquittance of all demands which he may have against the testator or his estate, did not contemplate a claim based on the fact that such beneficiary had become responsible for the expenses of the testator's last sickness. *In re Adin's Estate* 693

12. SAME (163)—SETTLEMENT AND ACCOUNTING — COMPENSATION — WAIVER OF RIGHT. The heirs of an executor who had died pending administration cannot complain there was no allowance for services of such deceased executor in the final account, where no account had been filed on behalf of the deceased executor and the report made no provision for compensation to either executor or administrators. *In re Adin's Estate*..... 693

13. EXECUTORS AND ADMINISTRATORS (165)—COMPENSATION—RATE AND AMOUNT. Where a substituted administrator finds nothing more to do than make distribution of the estate, he is entitled to receive only nominal compensation. *State ex rel. Simon v. Superior Court* 376

Exemptions:

Exemption from forced sale of real property as homestead, see HOMESTEAD.

1. EXEMPTIONS (10-18) — PROPERTY EXEMPT — NECESSARIES. Rem. Code, § 564, providing that no property shall be exempt from execution for actual necessaries, not exceeding fifty dollars in value, furnished to the defendant or his family within sixty days preceding the beginning of an action to recover therefor, even if conceded as applicable to a homestead exemption, would not apply where the evidence shows the necessaries were not furnished within the sixty-day period. *Downey v. Wilber*..... 660

Expenses:

As element of damages see DAMAGES, 4.
Liability of parties to mortgage, see MORTGAGES, 2.

Expert Testimony:

In civil actions, see EVIDENCE, 9.

Extension:

Of time for filing statement of facts, see APPEAL AND ERROR, 9.
Order of public service commission to extend street car line, see STREET RAILROADS, 1.

Extravagance:

As ground for divorce, see DIVORCE, 1.

False Representations:

See FRAUD.
Affecting validity of contract for sale of lands, see VENDOR AND PURCHASER, 1, 3, 5.

Fees:

Attorney, see ATTORNEY AND CLIENT, 2.
Stipulation in note for attorney's fees, see BILLS AND NOTES, 1.
Allowance of executor's fees, see EXECUTORS AND ADMINISTRATORS, 12, 13.
Attorney's fees incurred in trust litigation, see TRUSTS, 2.
Attorney's fees in will contest, see WILLS, 2.

Filing:

Statement of facts in lower court, see APPEAL AND ERROR, 8, 9.
Claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 9.
Declaration of homestead, see HOMESTEAD, 3, 4.
Petition to vacate judgment, see JUDGMENT, 6.
Lien claims, see LIENS, 4.
Claim against city, see MUNICIPAL CORPORATIONS, 22.

Findings:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 5.
Review on appeal or writ of error, see APPEAL AND ERROR, 13-15.
Necessity of in equity case, see TRIAL, 6.

Foreclosure:

Of chattel lien, see LIENS.
Of mortgage, see MORTGAGES.
Of special assessment lien, see MUNICIPAL CORPORATIONS, 5, 6.
Of tax lien, see TAXATION, 6-8.

Forfeiture:

Of land contract for vendee's breach of covenants, see VENDOR AND PURCHASER, 2.

Former Adjudication:

As bar to action, see JUDGMENT, 7, 8.

Fraud:

Of bank officer in discounting paper, see BANKS AND BANKING, 1.
As defense in action on note, see BILLS AND NOTES, 6.
Vacation of divorce decree, see DIVORCE, 2, 3.
As affecting right to appointment as administrator, see EXECUTORS AND ADMINISTRATORS, 1-3.
Of partner in acquiring adverse interest, see PARTNERSHIP.
Of trustee in procuring conveyance of trust estate, see TRUSTS, 3, 4.
Avoiding contract of sale of land, see VENDOR AND PURCHASER, 1, 3, 5.

1. FRAUD (5)—SALES—MISREPRESENTATIONS—VALUE OF PROPERTY—FUTURE EVENTS OR EXISTING FACTS. False representations as to the standing of a musicians' directory are not mere "trade talk" or "seller's praise" but are actionable, when made with intent to deceive, and they did deceive the purchaser, as to the value, although connected with future events, intermingled with existing facts, which formed an integral part thereof. *Horowitz v. Kuehl*..... 16

2. FRAUD (6, 22)—MISREPRESENTATIONS—RELIANCE ON STATEMENTS—EVIDENCE—SUFFICIENCY. Where the lessor misrepresents the quality of land leased for agricultural purposes, and the lessee has not equal means of knowledge of the existence of sufficient alkali in the soil to prevent the growing of crops, the lessor is liable in damages for the loss suffered by the lessee. *Miraldi v. Wick*.. 207

3. FRAUD (8, 22)—MISREPRESENTATIONS—RELIANCE UPON—MEANS OF KNOWLEDGE—EVIDENCE—SUFFICIENCY. The purchaser of a farm of 260 acres is entitled to recover damages for fraud where he relied on representations of the seller that there were 200 acres in cultivation when in fact there were but 140 acres cultivated, and the truth could not be readily ascertained, except by means of a

Fraud—Continued.

scientific survey because the farm was located in the foothills, and the land under cultivation was so irregular in shape and of such topography that it could not be seen all at one time from any elevated point. *Glasgow v. Brecht* 245

Frauds, Statute of:

1. FRAUDS, STATUTE OF (4)—PROMISE TO PAY DEBT—COLLATERAL OR ORIGINAL PROMISE. In an action for services performed for defendant and her deceased husband, an allegation of the complaint that defendant "would pay and cause to be paid" the reasonable value of the services to be rendered does not set up a collateral promise but alleges a positive promise to pay, not the debt of another, but her own debt. *Bounds v. Galbraith* 225

2. FRAUDS, STATUTE OF (20)—SALE OF REAL PROPERTY—CONTRACT FOR BROKER'S COMMISSIONS. Where a purchaser was put in possession of property with an understanding that he was to complete the contract, which was canceled by the death of a party, as soon as title could be perfected through the courts, the completion of an oral agreement in substantial compliance with the canceled written contract was sufficient under the statute of frauds. *Lemcke Co. v. Nordby* 221

3. FRAUDS, STATUTE OF (20)—BROKER'S COMMISSIONS—CONTRACT TO PAY FOR PAST SERVICES. A contract between parties to the exchange of properties in which it is agreed to pay a broker a commission for services in carrying out the transaction is one on its face for past services and does not necessitate the written contract between broker and principal required by Rem. Code, § 5289, in case of an agreement for the employment of a real estate broker. *Grant v. Ten Hope* 531

4. FRAUDS, STATUTE OF (51)—OPERATION—CONTRACTS PERFORMED. An oral contract modifying the terms of a written lease, whose term extends longer than one year, cannot be repudiated by either party after it has become an executed contract by performance. *Conlan v. Spokane Hardware Co.* 378

Fraudulent Conveyances:

1. FRAUDULENT CONVEYANCES (14)—SALE OF GOODS IN BULK—WHO ARE CREDITORS—STATUTES—CONSTRUCTION. The bulk sales law requiring an affidavit as to creditors on the sale of a stock of goods applies alike as to all creditors of the vendor, irrespective of whether the transaction between the parties was separate from and without regard to the business carried on by the vendor. *Phillips v. Verbeke* 173

2. FRAUDULENT CONVEYANCES (95, 97)—DEEDS—INTENT OF GRANTOR—WANT OF CONSIDERATION—EVIDENCE—SUFFICIENCY. A deed by a husband of all his separate property to his brother at a time when his

Fraudulent Conveyances—Continued.

marital relations were strained will, on granting a decree of divorce to the wife, be set aside for the purpose of awarding the wife a portion thereof, though no actual fraud on the part of the grantee is shown, where it appears the property was greatly in excess of any sum that might be due the brother; that any claim of the brother for loans was in fact outlawed; that it does not clearly appear that there was ever more than a constructive delivery of the deed; and that it was not recorded by the grantee until the expiration of a year following its execution, and but one week prior to the commencement of the divorce action. *Hall v. Hall*..... 615

Garnishment:

Effect of pendency of other action, see ABATEMENT AND REVIVAL, 1.
Death of party as ground for abatement, see ABATEMENT AND REVIVAL, 2.

1. GARNISHMENT (15-1)—PROPERTY ASSIGNED FOR COLLECTION. A fund collected by an assignor after assignment thereof to a third person for the purposes of collection, cannot be garnished as the property of the assignor, where the assignor was entitled to offset the amount and was not in fact indebted to the judgment debtor. *Austin v. Wallace* 61

2. GARNISHMENT (32-1)—EXTENT OF LIABILITY OF GARNISHEE. A garnishor can acquire by the garnishment no greater rights in property than the debtor had at the time of garnishment. *Austin v. Wallace* 61

Gifts:

Gifts to wife as separate property, see HUSBAND AND WIFE, 5.

Good Faith:

In dealings between trustee and *cestui que trust*, see TRUSTS, 1.

Harmless Error:

In civil actions, see APPEAL AND ERROR, 16-23.

Health:

As defense to action for breach of marriage promise, see BREACH OF MARRIAGE PROMISE.
Municipal ordinances providing precautions against disease, see MUNICIPAL CORPORATIONS, 7.

Hearsay:

In criminal prosecutions, see CRIMINAL LAW, 1.
In civil actions, see EVIDENCE, 3.

Highways:

Appropriation of land for highways, see EMINENT DOMAIN, 1.
Mandamus to compel repairs to county road, see MANDAMUS, 3.
Accidents at railroad crossings, see RAILROADS, 3, 4.
Effect of amendment of act on right to appeal, see STATUTES, 3.

1. HIGHWAYS (39)—ASSESSMENTS—JURISDICTION OF COURTS. Under Rem. Code, § 5769, permitting a property owner to secure a review by independent action in the superior court of an assessment under the Donohue Road Law, a direct appeal improperly taken, to the court, but treated by the parties as an independent action under the law warranted the court in taking jurisdiction. *Adams County v. Scott* 85

2. SAME. The rule that courts will not interfere with the action of the taxing authorities in putting valuations upon property for general tax purposes, or in levying assessments for the construction of streets in a municipality, unless the authorities have acted fraudulently, arbitrarily, or upon a fundamentally wrong theory, or unless the valuation is so manifestly unjust and excessive as to amount to constructive fraud, is directly applicable to county highways which are constructed in part at the expense of private property. *Adams County v. Scott* 85

3. SAME. Assessments made under the Donohue Road Law will not be set aside by the courts in the absence of a showing of fraudulent, arbitrary, or fundamentally wrong action by the county commissioners in making the assessment or that the appraisers acted in bad faith, or that the assessment was so excessive as to be a badge of fraud. *Adams County v. Scott*..... 85

4. HIGHWAYS (52, 59)—COLLISION—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for damages for collision between automobiles, it is proper to instruct that, though defendant may have been guilty of negligence, if plaintiff was aware of it in time so that by ordinary care he could have avoided the effect of such negligence and did not do so, plaintiff could not recover; and that in determining whether plaintiff was negligent the jury should take into consideration the circumstances surrounding him at the time and whether he acted as an ordinarily careful person would under the circumstances. *Poole's Seed & Implement Co. v. Rudene*.. 150

5. HIGHWAYS (53, 58)—COLLISION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether the driver of an automobile is guilty of contributory negligence in failing to slacken speed when an automobile behind is attempting to pass at the same time another car is approaching from the opposite direction, is a question for the jury, where it appears that he was going at a slow rate of speed, and expected the other car to pass. *Poole's Seed & Implement Co. v. Rudene* 150

Highways—Continued.

6. HIGHWAYS (57)—USE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained through being struck by an automobile on a public highway, the evidence sufficiently supports the court's finding of excessive speed on the part of the automobile, where it appears that the highway was paved with brick to a width of eighteen feet, but on either side was a dirt roadway; that plaintiff was hastening across the paved portion from an automobile from which he had alighted and when at a point in the highway between ten and fifteen feet from the edge of the highway pavement, was struck by a car coming from the opposite direction, which had left the paved road at a point seventy-five feet distant from the place of collision in an apparent effort to pass in front of the plaintiff. *Bryan v. Blodgett* 556

Homestead:

Exemption of property of debtors from forced sale in general, see EXEMPTIONS.

1. HOMESTEAD—CONSTRUCTION OF LAW. Homestead laws are to be liberally construed. *Security National Bank v. Mason* 95

2. HOMESTEAD (12)—PROPERTY CONSTITUTING—TITLE TO PROPERTY—LEASEHOLD INTEREST. A portable bungalow on leased land, in which one resides, may be claimed as a homestead under the statute defining a homestead as the "dwelling house in which the claimant resides and the land upon which the same is situated." *Downey v. Wilber* 660

3. SAME (35)—TIME FOR MAKING CLAIM. The first part of Rem. Code, § 529, declaring the homestead of every head of a family exempt from execution or attachment is still in force; and, under the last sentence, providing that such homestead may be selected at any time before sale, a judgment creditor acquires no priority of lien through filing a writ of attachment before the debtor makes his declaration of homestead. *Security National Bank v. Mason* 95

4. SAME. As against a purchaser on execution sale, a homestead declaration must be filed before sale. *Security National Bank v. Mason* 95

5. HOMESTEAD (38-40)—ACTIONS—CLAIM OF HOMESTEAD—PLEADING. Failure of judgment debtors to set up and claim a homestead in the action in which attachment issued (but which was done before execution sale) does not preclude or bar them from pleading, in an action by the execution purchaser to determine title, that the land was exempt as a homestead. *Security National Bank v. Mason* 95

Husband and Wife:

See MARRIAGE.

Divorce and judicial separation, see DIVORCE.

Husband and Wife—Continued.

Right to appointment as administrator of estate of deceased spouse, see EXECUTORS AND ADMINISTRATORS, 2.

Rights of survivor, see EXECUTORS AND ADMINISTRATORS, 5-8.

1. HUSBAND AND WIFE (12)—DISABILITIES OF COVERTURE—CONTRACTS OF WIFE. Where a wife makes a contract to pay a broker's commission on the sale of community property, she is liable therefor, in view of Rem. Code, §§ 5926, 5927, abolishing the civil disabilities of the wife. *Lemcke Co. v. Nordby*..... 221

2. HUSBAND AND WIFE (12)—DISABILITIES OF COVERTURE—DEBTS CONTRACTED BY WIFE. Under Rem. Code, § 5927, imposing liability upon a wife for her contracts to the same extent as if she were unmarried, she is liable upon her promise to pay a community debt. *Bounds v. Galbraith*..... 225

3. HUSBAND AND WIFE (19, 53, 60)—WIFE'S SEPARATE ESTATE—COMMUNITY PROPERTY — PRESUMPTIONS — EVIDENCE — SUFFICIENCY. The presumption that property deeded to one spouse after marriage is community property is rebuttable by proof that property was acquired in the name of the wife by and with the consent of the husband that it should be her separate property, at a time when its acquisition worked no hindrance to, or fraud upon, creditors. *Chapman v. Bain* 665

4. HUSBAND AND WIFE (42)—ACTIONS—PARTIES. An action by the husband for rescission of an exchange of property is not demurrable for defect of parties plaintiff because the wife was not joined, where the complaint alleged ownership of the property by the husband in his own right, such allegation being sufficient in the absence of a motion to make more definite and certain. *Stevens v. Sweitzer* 420

5. SAME (56-1)—COMMUNITY PROPERTY—IMPROVEMENTS ON SEPARATE PROPERTY. Where improvements upon land acquired as the separate property of the wife were made from gifts of money to her by a relative, and without the employment of community funds or resources, the status of the property as that of the wife is not affected. *Chapman v. Bain*..... 665

6. HUSBAND AND WIFE (105)—SEPARATE MAINTENANCE—RIGHT TO. Where a husband leaves a wife without sufficient cause, she is entitled to an allowance for separate maintenance if she is without adequate means of support. *Motley v. Motley*..... 234

7. HUSBAND AND WIFE (120) — ALIENATION OF AFFECTIONS — EVIDENCE—ADMISSIBILITY. A property settlement by husband and wife after separation cannot be shown in evidence by defendant in an action for alienation of the wife's affections. *Harringer v. Keenan* 311

8. HUSBAND AND WIFE (120)—ALIENATION OF AFFECTIONS — EVIDENCE—ADMISSIBILITY. In an action for alienation of affections,

Husband and Wife—Continued.

letters written by the wife to her husband showing affection are admissible, though written subsequent to the time defendant began attentions to the wife. *Harringer v. Keenan*..... 311

9. SAME (120)—ALIENATION OF AFFECTIONS — EVIDENCE — SUFFICIENCY. A finding that the defendant alienated the affections of plaintiff's wife is supported by evidence that the spouses lived together for nearly twenty-two years, having a mutual affection for each other; that plaintiff was required to be away from home a portion of each year in his calling as a fisherman; and that during these periods of absence the defendant paid the wife marked attention, with the result that she transferred her affections to him and finally abandoned her husband. *Harringer v. Keenan* 311

10. SAME. In an action for alienation of affections, a letter purporting to come from the wife after separation of the spouses, which was in the handwriting of defendant, is admissible for the purpose of showing his influence over her. *Harringer v. Keenan* 311

Ice:

On city street, liability for injuries, see MUNICIPAL CORPORATIONS, 17.

Identity:

Of accused, see CRIMINAL LAW, 3.
Of stolen property, see REPLEVIN.

Impeachment:

Of witnesses, see WITNESSES, 2.

Implied Contracts:

See LIMITATION OF ACTIONS.

Implied Warranty:

On sale of goods, see SALES, 6.

Improvements:

On separate property of wife, see HUSBAND AND WIFE, 5.
Public improvements, see MUNICIPAL CORPORATIONS, 3-6.

Incompatibility:

As ground for divorce, see DIVORCE, 1.

Incorporation:

Of towns, see MUNICIPAL CORPORATIONS, 1.

Industrial Insurance:

See MASTER AND SERVANT, 1.

Infants:

Custody and support on divorce of parents, see DIVORCE, 4, 5.

Injunction:

Amount of supersedeas on appeal from, see APPEAL AND ERROR, 7.
As affecting condemnation for right of way for ditch, see DRAINS.
Obstruction of streets, see MUNICIPAL CORPORATIONS, 8, 9.
Wrongful enforcement of tax, see TAXATION, 11.

1. INJUNCTION (24)—CONTRACTS—RESTRAINING BREACH—DAMAGES AS ADEQUATE REMEDY. Injunction will lie to restrain the breach of a contract, thereby indirectly effecting its specific performance, where the intent was to rely on performance and the contract is one which could not be specifically enforced in a court of equity by reason of the fact that it would require the performance of continuous duties. *Washington Cranberry Growers Ass'n v. Moore*.... 430

2. SAME (24). A breach of a contract may be properly restrained, where it provides for damages in case of a grower's failure to deliver his crops to an association for marketing, merely as an estimate, but recites it is impossible to fix the actual damages sustained in case of a grower's failure to abide by the agreement, and the purport of the whole contract shows that the parties intended to rely upon the performance of the covenant and not merely on the payment of damages for the breach thereof. *Washington Cranberry Growers Ass'n v. Moore*..... 430

Inspection:

Duty of city to inspect water meters, see MUNICIPAL CORPORATIONS, 19.

Instructions:

Review as dependent on requests in lower court, see APPEAL AND ERROR, 4.
Errors cured by, see APPEAL AND ERROR, 21.
Harmless error in refusal of requests for, see APPEAL AND ERROR, 22, 23.
In civil actions, see TRIAL, 2-4.

Insurance:

Limitation of action against agent for failure to write risk in solvent company, see LIMITATION OF ACTIONS.

1. INSURANCE (127)—ACCIDENT INSURANCE—CLASSIFICATION OF RISK. Under a provision of an accident policy insuring against bodily injury resulting in continuous disability from the date of the accident, it is not contemplated that there must be a disability from the very moment of injury; hence, where the insured became sick with blood poisoning within twelve hours after cutting his finger, and on the third day after the injury took to his bed, which he never left, the injury was one coming within the "continuous disability" clause. *Rorabaugh v. Great Eastern Cas. Co*..... 7

2. SAME (128)—ACCIDENT INSURANCE—DEATH OF INSURED—"EXTERNAL, VIOLENT AND ACCIDENTAL MEANS"—CONSTRUCTION OF POLICY.

Insurance—Continued.

Where an accident policy insured against all the effects of bodily injury caused directly, solely and independently of all other causes by external, violent and accidental means, the beneficiary was entitled to recover the full indemnity for death, which was due to blood poisoning resulting from an accidental cut, though another provision of the policy limited liability to one month's indemnity in case of death from blood poisoning; since the cutting of insured's finger, inducing blood poisoning, was the direct and external means whereby death resulted. *Rorabaugh v. Great Eastern Cas. Co.* 7

3. INSURANCE (185)—ACCIDENT INSURANCE—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY. The direct cause of death, in an action on an accident insurance policy, was properly a question for the jury under evidence showing death was caused by blood poisoning which resulted from a cut on the finger, the cutting and the inoculation being simultaneous. *Rorabaugh v. Great Eastern Cas. Co.*..... 7

Intent:

Element of fraud as to creditors, see FRAUDULENT CONVEYANCES, 2.

Interest:

1. INTEREST (3)—COMPENSATION FOR USE—ACCEPTANCE OF CHECK. Where a check for an advance premium of insurance is accepted as in full payment, the recovery of interest for delay in payment of the account is foreclosed. *London Guaranty & Accident Co. v. Western Smelting & Power Co*..... 568

2. INTEREST (20)—RIGHTS AND LIABILITIES—SETTLEMENT OF ACCOUNT. Where earned premium on an indemnity insurance policy is not payable until an audit of the amount due as determinable by the pay roll for the year, no interest is allowable on the amount due, in the absence of proof as to when an audit was made. *London Guaranty & Accident Co. v. Western Smelting & Power Co*.... 568

Issuance:

Of stock certificate, see CORPORATIONS, 1.

Joinder:

Of causes of action, see ACTION, 1.

Joint Adventures:

See PARTNERSHIP.

Judges:

View of premises as ground for vacation of judgment, see JUDGMENT, 5.

Mandamus to judge, see MANDAMUS, 1, 2.

Increase of salary during term, see STATES, 1.

Judgment:

Review in general, see APPEAL AND ERROR.
Vacation of as restoring right to appeal, see APPEAL AND ERROR, 6.
Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 24, 25.
On appeal, see APPEAL AND ERROR, 26.
Decision of courts in general, see COURTS.
Vacation of decree of divorce, see DIVORCE, 2, 3.
Modification of decree respecting custody of children, see DIVORCE, 4, 5.
Sale of land for nonpayment of tax, see TAXATION, 8.
In action to rescind contract for fraud of vendor, see VENDOR AND PURCHASER, 5.

1. JUDGMENT (54)—TRIAL (60)—NOTWITHSTANDING VERDICT—POWER OF COURT. A motion for judgment non obstante veredicto must be based solely on matters appearing in the record, and cannot be supported by affidavit. *Anderson v. Bauer*..... 70

2. SAME. In an action for damages by a workman injured away from his employer's plant, the fact of his prior election to claim under the workmen's compensation act is not a jurisdictional question which may be determined on motion for judgment non obstante veredicto without a showing of the election appearing upon the record. *Anderson v. Bauer*..... 70

3. JUDGMENT (54)—NOTWITHSTANDING VERDICT. A motion for judgment non obstante veredicto, and in the alternative for a new trial was properly refused where the evidence within the issues was such that the jury could readily have decided in favor of either plaintiffs or defendant. *Oliver v. Polson*..... 385

4. JUDGMENT (65)—CONFORMITY TO PLEADINGS—AMOUNT DEMANDED—AGISTER'S LIEN—FORECLOSURE. A judgment for an agister's lien, which includes an amount due between the time of commencement of the action and the time of trial, though without the filing of a supplemental complaint, is not prejudicial where the same rate was allowed after, as before, the institution of the action. *Minard v. Schumaker*..... 599

5. JUDGMENT (108)—VACATION—GROUNDS—VIEW OF PREMISES BY JUDGE. An inspection of mining premises by the trial judge in an equitable action to determine whether alleged annual assessment work had been done by a claimant is not ground for vacation of a judgment, when it was done upon notice to the opposing counsel. *Wentworth v. Perrizo*..... 191

6. SAME (121)—VACATION—TIME FOR APPLICATION. Under Rem. Code, § 465, providing that petition for vacation of a judgment must be filed "not later than after the discovery" of the ground therefor,

Judgment—Continued.

a petition filed practically a year after knowledge of the alleged ground is not timely filed. *Wentworth v. Perrizo*..... 191

7. JUDGMENT (212) — CONCLUSIVENESS—PERSONS NOT PARTIES. A decree cancelling a contract for the exchange of properties, to which a broker who had rendered services in bringing about the exchange was not a party, would not bar the broker from enforcing any right to compensation earned. *Grant v. Ten Hope*..... 531

8. JUDGMENT (227)—BAR—MATTERS AND PARTIES CONCLUDED—MATTERS NOT IN ISSUE. That mortgagors and their grantee were parties defendant to a mortgage foreclosure wherein a deficiency judgment was rendered against the mortgagors was not an estoppel by judgment of the right of the mortgagors to sue their grantee in a subsequent action on her assumption of the mortgage debt, where that issue was not litigated in the foreclosure action. *Bollong v. Corman* 336

Judicial Sales:

Of land for nonpayment of taxes, see TAXATION, 6-8.

Jurisdiction:

Appellate jurisdiction in general, see APPEAL AND ERROR, 1, 2.
Criminal prosecutions, see CRIMINAL LAW, 2.
Vacation of divorce decree, see DIVORCE, 2.
Review of assessment for highway improvement, see HIGHWAYS, 1.
Want of jurisdiction as ground for writ of prohibition, see PROHIBITION.

Jury:

Misconduct cured by instructions, see APPEAL AND ERROR, 21.
Instructions in civil actions, see TRIAL, 2-4.

Laches:

To enforce trusts, see TRUSTS, 4.

Landlord and Tenant:

Agreement to reduce rent, see ACCORD AND SATISFACTION, 2.
Fraud of lessor in representing quality of leased land, see FRAUD, 2.
Dwelling on leased land as homestead, see HOMESTEAD, 2.
Recovery of royalties under coal mining lease, see MINES AND MINERALS.

1. LANDLORD AND TENANT (12-1, 115)—LEASE—MODIFICATION—EVIDENCE—SUFFICIENCY. A modification of the rental charge under a written lease is sufficiently shown by evidence that the lessee would have ceased to do business as a going concern and been forced into insolvency if the rent had not been reduced, resulting in the loss

Landlord and Tenant—Continued.

of defendant as a tenant, of which facts the landlord had knowledge; and that payments were made for a smaller rental by checks indorsed "rent paid in full to date," which were accepted by the landlord without question until a disagreement arose between the parties over the terms of a renewal of the lease. *Conlan v. Spokane Hardware Co.* 378

2. SAME (129)—DEFENSES—POSSESSION AS AGENT OF LESSEE—POWER OF ATTORNEY—EVIDENCE—SUFFICIENCY. Where the owner of premises let to a Japanese refused to permit him to sublet the land to other Japanese on his departure for Japan, his placing a Japanese in possession under a general power of attorney was merely an attempt to circumvent the terms of the lease, which prohibited the leasing to, or occupancy by, any other person except by the written approbation of the lessor first obtained. *Guill v. Enomoto*..... 575

3. LANDLORD AND TENANT (139)—UNLAWFUL DETAINER—ACTIONS—PARTIES DEFENDANT. In an action by a landlord against the assignee of his tenant to compel him to vacate the premises, based on his commission of waste and on the maintenance of a nuisance thereon, the lessee of the premises is not a necessary party defendant. *Guill v. Enomoto*..... 575

Lateral Support:

Damages for removal of, see MUNICIPAL CORPORATIONS, 3.

Law of the Case:

Decision on appeal, see APPEAL AND ERROR, 24, 25.
Previous decisions as controlling, see CARRIERS, 6; COURTS.

Lawyer:

See ATTORNEY AND CLIENT.

Leading Questions:

See WITNESSES, 2.

Leases:

See LANDLORD AND TENANT.

Letters:

Admissibility in general, see EVIDENCE, 4.

Liens:

Agister's lien, see ANIMALS.
Lien of attorney for compensation, see ATTORNEY AND CLIENT, 2.
Lien of garnishment, see GARNISHMENT, 2.
Judgment for agister's lien, see JUDGMENT, 4.
Tax lien, see TAXATION, 3-5.

Liens—Continued.

1. LIENS (2)—STATUTORY LIENS—RIGHT TO LIEN—CONSENT OF OWNER—STATUTES. One repairing an automobile at the request of a gratuitous bailee of the car is not entitled to a lien for services as against the owner, under Laws 1917, p. 229, § 1, which authorizes a lien for labor performed or materials furnished in the repair of a chattel "at the request of the owner." *Thompson v. Thompson* 690

2. LIENS (5)—CHATTEL LIENS—RIGHT TO LIEN—POSSESSION OF PROPERTY. Under Laws 1917, p. 229, one furnishing material to be used in the construction of an article is entitled to a lien on the manufactured article, though he never had possession of the latter. *Prescott Co. v. Franklin Tool Works*..... 283

3. LIENS (5)—CHATTEL LIENS—RIGHT TO LIEN—ASSIGNMENT OF DEBT OR CLAIM. A corporation which has a contract for the manufacture of machinery parts has a right of lien thereon, though the actual work is done by a closely affiliated corporation, where there was no transfer of the contract by assignment or novation. *Prescott Co. v. Franklin Tool Works*..... 283

4. SAME (5)—PROCEEDINGS TO PERFECT—NOTICE OF LIEN—TIME FOR FILING. Under Laws 1917, p. 229, § 2, providing that lien claims for work or materials on chattels must be filed "within sixty days from the date of delivery of such chattel to the owner," the date of last delivery of material fixes the time for beginning of the running of the period of limitation. *Prescott Co. v. Franklin Tool Works* 283

5. SAME (6)—ENFORCEMENT—DEFENSE—PAYMENT—EVIDENCE. The fact that one liable for the cost of castings for an engine accepted a trade acceptance which was not paid would not operate as a payment of the debt nor defeat the right of foreclosure of a chattel lien. *Prescott Co. v. Franklin Tool Works*..... 283

Limitation:

On amount of assessments for public improvements, see MUNICIPAL CORPORATIONS, 4.

Limitation of Actions:

Accrual of cause of action, see ACTION, 2.

Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 6.

To enforce trust, see TRUSTS, 4.

1. LIMITATION OF ACTIONS (17-1)—APPLICABLE TO PARTICULAR ACTIONS—BREACH OF IMPLIED CONTRACT. The cause of action against an insurance agent for failure to write insurance for an applicant in a solvent company arises at the time of writing the insurance, and not at the time damages accrue from a fire loss; hence the ac-

Limitation of Actions—Continued.

tion is barred under Rem. Code, § 159, if not instituted within three years after placing the insurance in an insolvent company. *Shaw v. Rogers & Rogers* 161

Lis Pendens:

Pendency of other action ground for abatement, see ABATEMENT AND REVIVAL, 1.

Loans:

Authority of officers to make loans, see BANKS AND BANKING, 1.

Local Assessments:

Payment of as condition precedent to tax foreclosure, see TAXATION, 8.

Location:

Of boundary lines, see BOUNDARIES.
Of water mains in city street, see WATERS AND WATER COURSES.

Maintenance:

Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS, 5-8.
Right of wife to allowance for maintenance, see HUSBAND AND WIFE, 6.

Mandamus:

Amount of supersedeas on appeal from, see APPEAL AND ERROR, 7.

1. MANDAMUS (4)—TO COURTS—JUDICIAL PROCEEDINGS—REMEDY BY APPEAL. Under the rule that a writ of mandamus issues to a lower court to compel it to exercise its judicial functions and powers, not to direct or control their exercise, the writ will be denied when it is sought as a mode of determining the constitutionality of a statute on which the lower court had rested its conclusion. *State ex rel. Fleischman v. Superior Court* 500

2. MANDAMUS (28)—TO COURTS—ALLOWANCE OF COST BILL—MINISTERIAL DUTIES. The duty of the court to direct payment of a cost bill for the expenses of investigation of the fitness of an attorney to practice law, after approval of the items, being a ministerial one, mandamus will lie to compel its performance by the court. *State ex rel. Royse v. Superior Court* 3

3. MANDAMUS (35)—TO COUNTY BOARD—OPENING COUNTY ROAD—MATTERS OF DISCRETION. Mandamus will not lie to compel a board of county commissioners to repair a road, in the absence of a showing that its refusal was arbitrary or capricious, in view of the fact that Rem. Code, § 5575, vests the board with discretion to open and work only "such roads as are necessary for public convenience." *State ex rel. Good Hope Gold & Copper Mining & Development Co. v. Morgan* 214

Mandate:

To lower court on decision on appeal or writ of error, see APPEAL AND ERROR, 26.

Marriage:

Breach of promise, see BREACH OF MARRIAGE PROMISE.

1. MARRIAGE (14) — PROOF OF MARRIAGE — EVIDENCE — SUFFICIENCY. Marriage of parties is sufficiently proved by the testimony of the surviving wife that they were married during a trip to Canada, although she could not produce the marriage certificate or remember the town where, or the clergyman by whom, they were married, where a number of witnesses testified to having seen the certificate, and there was evidence that the parties publicly held themselves out as man and wife until the death of the husband some ten years later. *In re Emmans' Estate*..... 182

2. MARRIAGE (20, 21)—ANNULMENT—SCOPE OF RELIEF—PROPERTY RIGHTS. On annulment of a void marriage the court has power to award the wife real property standing in the name of the husband which had been acquired by their joint efforts while living together as husband and wife. *Powers v. Powers*..... 248

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

1. MASTER AND SERVANT (20-1)—WORKMEN'S COMPENSATION ACT. Rem. Code, § 6604-3, gives a workman entitled to industrial insurance the election to take under the act, or sue third persons, for injuries occurring "away from the plant." *Anderson v. Bauer*..... 70

2. MASTER AND SERVANT (130)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—PRESUMPTIONS AND BURDEN OF PROOF. Though an inference of negligence may arise from proofs of an accident causing an injury when attended with certain circumstances, even if there is no direct proof of specific negligence, an inference of negligence sufficient to make a prima facie case does not arise from the mere happening of an accident. *Patrick v. Spokane & Eastern R. & Power Co.* 317

3. SAME. A workman in a railway repair shop who is injured by being struck by a casting which fell from a traveling crane cannot recover merely on the ground that the accident showed negligence on the part of the master, where there was no proof that the crane was furnished for plaintiff's use, or that he was using it at the time, or that the castings were improperly tied, the evidence, however, showing that plaintiff had left a place of safety, and entered into the zone of danger merely to expedite the return of the crane for use at the point where he was engaged in working. *Patrick v. Spokane & Eastern R. & Power Co.*..... 317

Measure of Damages:

In general, see DAMAGES.

For failure to deliver goods sold, see SALES, 8, 9.

Mechanics' Liens:

See LIENS.

Mental Suffering:

As element of damages, see DAMAGES, 4.

Merger:

Of estates, see TAXATION, 9.

Mines and Minerals:

Officer acquiring adverse interest to corporation, see CORPORATIONS, 2.

Pleading causes of action for breach of mining lease, see ELECTION OF REMEDIES.

1. MINES AND MINERALS—LEASE—ROYALTIES—ACTIONS—BURDEN OF PROOF. In a suit for minimum royalties under a coal mining lease, for a term of years unless the coal should be sooner exhausted or it should be ascertained that merchantable coal sufficient in quantity to be profitably mined did not exist, the burden of proof is upon the lessees to show that reasonable search and exploration of the lands had been made for the purpose of determining the essential conditions. *Oliver v. Polson* 385

2. MINES AND MINERALS—LEASE—ROYALTIES—ACTION FOR BREACH—INSTRUCTIONS. In an action for royalties under a mining lease, where there was evidence that one of the plaintiffs had ordered employees of the lessee off the lands after the suit was commenced, an instruction that the refusal to permit the defendant to prospect or occupy the lands would defeat the right of plaintiffs to recover royalties after that date, was not prejudicial, the instruction being made in the interest of defendant's rights. *Oliver v. Polson*..... 385

Misconduct:

Of jurors, see TRIAL, 5.

Misrepresentation:

See FRAUD.

Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 1, 3, 5.

Mistake:

Ground for rescission of contract, see CONTRACTS, 4.

Ground for jurisdiction of equity in general, see EQUITY.

Modification:

Of divorce decree, see DIVORCE, 4, 5.
Of lease by oral agreement, see LANDLORD AND TENANT, 1.

Money:

Assignment of money due under contract, see ASSIGNMENTS, 1.
Compensation for use of, see INTEREST.

Money Paid:

Recovery of payments, see PAYMENT, 1.

Money Received:

Recovery of payment in general, see PAYMENT, 1.
Recovery of price paid for land, see VENDOR AND PURCHASER, 8, 9.

Monopolies:

Contracts in restraint of trade, see CONTRACTS, 3.

Mortgages:

Parol evidence as to nature of consideration, see EVIDENCE, 5.
Priority of tax title over lien of prior mortgage, see TAXATION, 10.

1. MORTGAGES (45, 53)—ESTATES OR INTERESTS OF PARTIES—TITLE FROM PURCHASER AT TAX SALE—RIGHT TO FORECLOSE. Where the title to mortgaged premises had passed from the mortgagor to the holder of a tax deed, who sold a portion of the premises to a third party and, in order to effect the conveyance, quit-claimed all the land back to the mortgagor for the purpose of having him convey to the third party, the mortgagee could not enforce his mortgage against the entire tract, inasmuch as the third party was the equitable owner of the portion bought and paid for by him, the mortgagor being merely a medium through which the transfer was made without title vesting in him as to such tract. *Robison v. Barnhart* 218

2. MORTGAGES (102) — ASSUMPTION OF MORTGAGE — EXPENSES — RECOVERY FROM GRANTEE. Expenditures of mortgagors in a foreclosure proceeding, incurred in a fruitless effort to show that the mortgagee had made a contract releasing them, cannot be recovered in a subsequent action by the mortgagors against their grantee who had assumed the mortgage debt which they were compelled to pay. *Bollong v. Corman* 336

3. MORTGAGES (102, 124-1)—TRANSFER OF PROPERTY—ASSUMPTION OF MORTGAGE—PAYMENT—PARTIAL RELEASE—CREDITS—RIGHTS OF MORTGAGOR AND PURCHASER. A building company contracted two lots to appellant under an agreement to build a house thereon, giving to a bank a mortgage on the premises which the appellant assumed and

Mortgages—Continued.

had fully paid as the balance of purchase price for house and lots; subsequent to such contract, the building company included these two lots in another mortgage made to the bank to secure $2,400, under an agreement that any lot, other than the two above mentioned, should be released upon the payment of $200 each; part of the lots were released as payments were made on the note to the bank until there remained a balance due of $450.67, at which time two and one-half lots were released by the mortgagee without crediting the agreed amount of $200 per lot on the indebtedness, which would have been sufficient to satisfy the lien of the mortgage. Held, that appellant is entitled to a decree discharging his property from the lien of the building company's second mortgage to the bank. *Haggerty v. Building Investment Co*..... 668

4. MORTGAGES (259)—REDEMPTION—ALLOWANCES—POWER TO IMPOSE CONDITIONS ON REDEMPTIONER. Under an agreement between a mortgagee and a holder of second mortgage bonds on the same property, whereby the notes and mortgage owned by the first mortgagee were surrendered to a trust company to be held in escrow, pending purchase of the property by the second mortgage bondholder, and the first mortgage was foreclosed on demand of such bondholder and the property purchased by the trustee, the second mortgage bondholder had no right to have the amount due him included as part of the sum payable on a redemption from the foreclosure sale by a judgment creditor of the mortgagor, since such action would tend to defeat redemption from the foreclosure sale to the possible detriment of the first mortgagee. *Spokane City Club v. Union Trust Co.* 587

Motions:

As waiver of special appearance, see APPEARANCE.
For reinstatement of cause, see DISMISSAL AND NONSUIT.
For judgment *non obstante veredicto*, see JUDGMENT, 1-3.
To open or vacate judgment, see JUDGMENT, 5, 6.

Municipal Corporations:

Exercise of power of eminent domain, see EMINENT DOMAIN, 3.
Water supply, see WATERS AND WATER COURSES.

1. MUNICIPAL CORPORATIONS (3-1)—PETITION TO INCORPORATE—PUBLICATION OF NOTICE—DESCRIPTION OF BOUNDARIES—STATUTES. A notice of hearing by the county commissioners upon a petition for the formation of a town, which fails to describe the boundaries as petitioned for is such a jurisdictional defect as to invalidate the proceedings for incorporation. *State ex rel. Great Northern R. Co. v. Herschberger* 275

Municipal Corporations—Continued.

2. MUNICIPAL CORPORATIONS (65, 66)—EMPLOYEES—REMOVAL—CIVIL SERVICE RESTRICTIONS—REVIEW BY COURTS. Where a city has by its charter vested its officers with exclusive authority to discharge civil service employees on stating the "reasons therefor," without specifying what reasons are sufficient, such action of its officers is not reviewable by the courts. *Ford v. Seattle*..... 55

3. SAME (190) — STREETS — IMPROVEMENT — DAMAGES — REMOVAL OF LATERAL SUPPORT. A city is liable for removal of lateral support to property in making an original grade of the street, where it negligently leaves a clay bank exposed, since it is chargeable with knowledge that the bank is likely to slide when subjected to the action of the elements. *Clark v. Olympia*..... 506

4. MUNICIPAL CORPORATIONS (236)—IMPROVEMENTS—ASSESSMENTS—AMOUNT OF ASSESSMENTS—LIMITATIONS — STATUTES — CONSTRUCTION. Laws 1915, ch. 168, § 1, providing that the cost of a local improvement shall "not exceed fifty per cent of the valuation of the real estate, exclusive of improvements thereon, within such district, according to the valuation last placed upon it for the purpose of general taxation," is not a limitation to the assessed value of the property where that differs from the actual value; in view of Laws 1913, p. 438, § 1, which provides that "all property shall be assessed at not to exceed fifty per cent of its true and fair value in money." *Schoen v. Seattle*..... 303

5. SAME (295)—ACTIONS FOR SALE OF LAND—DEFENSES. The foreclosure of a lien represented by a certificate of delinquency for general taxes would not bar foreclosure proceedings for special assessments, in view of Rem. Code, § 7892-40, providing that one foreclosing for general taxes shall either pay in full all local assessments or may proceed to acquire title to the property subject to certain or all of the local assessments that are a lien thereon. *Schroeder v. Raymond*..... 238

6. MUNICIPAL CORPORATIONS (300)—PARTIES—SPECIAL ASSESSMENTS—FORECLOSURE OF LIEN. The holder of local improvement bonds made payable to bearer may properly maintain an action to foreclose the lien of delinquent assessments out of which such bonds are made payable, where such bonds, properly executed, are produced in court and admitted in evidence, notwithstanding others may have some financial interest in them. *Schroeder v. Raymond*..... 238

7. SAME (313)—ORDINANCES—PUBLIC HEALTH—BASEMENT DRAINS—REASONABLENESS—POLICE POWER. The ordinance of the city of Seattle relating to drainage of basements (No. 22,839 as amended by No. 36,792) is a proper exercise of the police power. *Hub Clothing Co. v. Seattle*..... 251

Municipal Corporations—Continued.

8. MUNICIPAL CORPORATIONS (356, 370)—USE OF STREETS—OBSTRUCTIONS — RIGHTS OF ABUTTING OWNERS — INJUNCTION — DECREE. An owner of residence property is not entitled to an injunction against the use of any part of the pavement in front of and abutting on his property, by a small electric truck, with rubber tires, where the pavement was not intended as a sidewalk, and the truck only made infrequent trips and did not interfere with use by pedestrians. *Ostant v. Pacific Grocery Co.* 103

9. SAME. Where a railway company has constructed a common-user spur-track in an alley with the consent of the city under the power granted by Rem. Code, § 7507, subd. 9, a decree enjoining defendant from using that part of the track opposite plaintiff's premises for the storage of cars, and restraining defendant from allowing cars being loaded from its warehouse to project in the rear of plaintiff's premises longer than forty-eight hours, sufficiently protects the personal and property rights of plaintiff. *Ostant v. Pacific Grocery Co.* 103

10. MUNICIPAL CORPORATIONS (379, 392)—STREETS—COLLISION AT CROSSING—MUTUAL RIGHTS IN MEETING AND CROSSING—ORDINANCES—INSTRUCTIONS. Under a city ordinance providing that drivers approaching street intersections shall look out for and give right of way to vehicles on their right simultaneously approaching a given point, where two vehicles simultaneously approach the intersection of three streets the car coming from the right has a right of way over the other. *Surry v. Seattle Taxicab Co.* 559

11. MUNICIPAL CORPORATIONS (380, 392) — STREETS — COLLISION WITH AUTO TRUCK—VIOLATION OF ORDINANCE—INSTRUCTIONS. Where an action for damages was based on the negligence of defendant in striking with a motor truck a pedestrian in the street who had alighted from a street car, it was not error for the court to refuse an instruction based on a city ordinance prohibiting pedestrians from stepping into a street at a point between street intersections. *Eddy v. Spelger & Hurlbut* 632

12. MUNICIPAL CORPORATIONS (381, 390) — STREETS — AUTOMOBILES — NEGLIGENT USE—RATE OF SPEED—QUESTION FOR JURY. In an action for personal injuries resulting from being struck by an automobile, the question of the driver's negligence is one for the jury, where the evidence shows plaintiff was on the unpaved portion of a street used by street railway lines for the purpose of boarding a car; that the defendant was driving her car on the paved portion of the street adjoining the unpaved strip at an excessive rate of speed; that she swerved to the left to avoid a parked car, and due either to skidding on the slippery pavement or to the excessive speed preventing the driver from turning to the right quickly enough, the automobile

Municipal Corporations—Continued.

ran off the paved portion of the street onto the unpaved portion and struck the plaintiff. *Gosa v. Hyde* 672

13. SAME (381, 390)—COLLISION—VIOLATION OF ORDINANCE—RATE OF SPEED—QUESTION FOR JURY. The refusal of the court to take the issue of speed of a motor vehicle from the jury in a damage case was not error, where there was evidence that the rate of speed violated both a city ordinance limiting speed at street crossings and also a state statute (Laws 1915, p. 394, § 23) prohibiting the driving of a motor car at a greater rate than is reasonable and proper, having a regard for the traffic on the highway. *Eddy v. Speiger & Hurlbut* 632

14. SAME (384, 392)—PROXIMATE CAUSE—INSTRUCTIONS. An instruction defining proximate cause as "the cause which immediately preceded and directly produces the effect, as distinguished from a remote cause" is not approved as applied to the facts in the case. *Gosa v. Hyde* 672

15. SAME (392)—AUTOMOBILES—DEGREE OF CARE—DUTY OF DRIVER—SUDDEN EMERGENCY—INSTRUCTIONS. The refusal of the court to give requested instructions dealing with the duty of an automobile driver when confronted with a sudden emergency, was proper, where the evidence tended to show that the emergency, if any, arose from the operation of the automobile at an excessive rate of speed. *Gosa v. Hyde* 672

16. SAME (405)—TORTS—LIABILITY TO VIOLATOR OF ORDINANCE—EFFECT OF NONENFORCEMENT. The failure of a city to prosecute one for noncompliance with the terms of an ordinance relating to drainage of basements would not impose liability on the city for injury resulting from its nonenforcement. *Hub Clothing Co. v. Seattle* 251

17. MUNICIPAL CORPORATIONS (426, 465)—SIDEWALKS—SNOW AND ICE—NEGLIGENCE—QUESTION FOR JURY. Where for a month or more ice had remained upon a city sidewalk at a place where a woman slipped and was injured by a fall, the ice being uneven and rounded upon the sidewalk which sloped in two directions, the city was liable in damages, though the water from which the ice was partly formed came from adjoining premises; nor would the fact that there had been alternate thawing and freezing relieve the city. *Murray v. Spokane* 401

18. MUNICIPAL CORPORATIONS (473, 479)—TORTS—DEFECT IN WATER METER—ACTIONS—INSTRUCTIONS—BURDEN OF PROOF. In an action for damages for injuries resulting from the bursting of a water meter installed by defendant, it was error to refuse a requested instruction that, when plaintiff has shown a situation which could not have taken place except by the operation of abnormal causes,

Municipal Corporations—Continued.

then the onus rests upon the defendant to prove that the injury was caused without his fault. *Hub Clothing Co. v. Seattle*..... 251

19. SAME (479)—ACTIONS—INSTRUCTIONS—DUTY OF INSPECTION. The refusal of the court, in instructing the jury as to the city's duty with respect to the inspection of its water meters, to define "reasonable inspection" as not confined to optical observation but as embracing tests and examinations, constituted error. *Hub Clothing Co. v. Seattle*..... 251

20. MUNICIPAL CORPORATIONS (566)—CLAIMS—DESCRIPTION OF DEFECT—SUFFICIENCY. A claim against a municipality for personal injuries describing the place and cause of injury as a "defective sidewalk located on the northerly side of Yakima street about 80 feet westerly of the intersection of Yakima street with Oregon street" is insufficient, in view of Rem. Code, § 7998, requiring that such claim "must accurately locate and describe the defect that caused the injury." *Hanan v. Wenatchee*..... 279

21. SAME (566)—CLAIMS—RECITALS—SUFFICIENCY. The "items of damages" required under Rem. Code, § 7998, to be set out in a claim against a city are sufficiently specified where the claim sets out in detail the making of a street improvement, a description of the property, the character of the soil, the removal of lateral support, the extent of the slide, and the damages suffered. *Clark v. Olympia* 506

22. MUNICIPAL CORPORATIONS (568)—CLAIMS—TIME FOR FILING—EVIDENCE. It cannot be objected that a claim against a city was not filed within the thirty days required by Rem. Code, § 7998, where the evidence shows damage to property through the negligence of the city occurred during the latter part of the month of January and the claim was filed on February 17. *Clark v. Olympia*..... 506

Mutuality:

Necessity for mutuality of obligation, see CONTRACTS, 1.

Necessaries:

Exemption from execution sale, see EXEMPTIONS.

Necessity:

For condemnation of land for public use, see EMINENT DOMAIN, 1.
For track connection between two railroads, see RAILROADS, 1, 2.

Negligence:

Of bailee, see BAILMENT.
Rights and liabilities as between banks, see BANKS AND BANKING, 2
Personal injuries to passengers in general, see CARRIERS, 7-9.
Damages in general, see DAMAGES.
In use of highway, see HIGHWAYS, 4-6.

Negligence—Continued.

Of employers, see MASTER AND SERVANT.
Causing injuries to persons on city streets, see MUNICIPAL CORPORATIONS, 10-15, 17
Liability of cities for torts, see MUNICIPAL CORPORATIONS, 16-19.
Injuries from snow and ice on sidewalk, see MUNICIPAL CORPORATIONS, 17.
Accidents at railroad crossings, see RAILROADS, 3, 4.
In operation of street railroads, see STREET RAILROADS, 2-4.

Negotiable Instruments:

See BILLS AND NOTES.

New Trial:

Review of partial judgment on motion for, see APPEAL AND ERROR, 2.
Review of rulings on motion for, see APPEAL AND ERROR, 10, 12; EMINENT DOMAIN, 3.
Decision on appeal as law of the case on new trial, see APPEAL AND ERROR, 24, 25.

1. NEW TRIAL (8)—PREJUDICE OF JUDGE—TRIAL DE NOVO. A divorce action being triable de novo on appeal, the fact that the trial judge may have been prejudiced against appellant affords no ground for awarding a new trial. *Schoblom v. Schoblom*..... 67

2. NEW TRIAL (22)—GROUNDS—SUFFICIENCY OF EVIDENCE. In an action on promissory notes where the only defense is want of consideration, it is error for the court to grant a new trial after verdict for plaintiff, where the evidence shows plaintiff is a holder in due course. *National Finance Co. v. Emerson*..... 297

3. NEW TRIAL (22)—GROUNDS—VERDICT CONTRARY TO EVIDENCE. A new trial was properly denied in an action for personal injuries, where there was evidence supporting plaintiff's theory of the case, although the eye-witnesses to the accident were few and the physical facts preponderate strongly in defendant's favor. *Eddy v. Spelger & Hurlbut*..... 632

4. NEW TRIAL (24)—VERDICT AGAINST WEIGHT OF EVIDENCE. Where the verdict of the jury is based upon the unsupported testimony of the prevailing party, which is inconsistent with itself and disproved by physical facts relating to the only issue in the case, there is a failure of proof, warranting the setting aside of the verdict by an appellate court. *Swafford v. Levin*..... 681

5. NEW TRIAL (40)—GROUNDS—NEWLY DISCOVERED EVIDENCE. The denial of a motion for new trial is not an abuse of the court's discretion, where affidavits alleging newly discovered evidence are contradicted by counter-affidavits. *Murray v. Spokane*..... 401

Newly Discovered Evidence:

Ground for new trial, see NEW TRIAL, 5.

Nonsuit:

Before trial, see DISMISSAL AND NONSUIT.

Notes:

Promissory notes, see BILLS AND NOTES.

Notice:

Of fraud of officer, see BANKS AND BANKING, 1.
Claim of lien, see LIENS, 4.
Of hearing on petition to incorporate town, see MUNICIPAL CORPORATIONS, 1.
Claims against city for damages, see MUNICIPAL CORPORATIONS, 20-22.
Of hearing for removal of teacher see SCHOOLS AND SCHOOL DISTRICTS.
Sale for taxes, see TAXATION, 6, 7.
Of forfeiture, see VENDOR AND PURCHASER, 2.

Novation:

1. NOVATION (2)—NATURE AND ELEMENTS—SUBSTITUTION OF OBLIGATION BETWEEN SAME PARTIES. Novation is a contractual relation based upon a new contract by all the parties interested, and must be founded upon mutual agreement, proper consideration and a valid prior obligation to be displaced. *Prescott Co. v. Franklin Tool Works* 283

Objections:

Review as dependent on objection made on trial, see APPEAL AND ERROR, 3.
To failure to file statement of facts, see APPEAL AND ERROR, 8.

Obstructions:

Of streets, see MUNICIPAL CORPORATIONS, 8, 9.

Officers:

Duties of state auditor under soldiers' bonus act, see BOUNTIES, 3.
Dealings with corporation, see CORPORATIONS, 2.
Mandamus to control discretion of, see MANDAMUS, 3.
Liability of municipality for torts of officers, see MUNICIPAL CORPORATIONS, 16-19.
Prohibiting acts in excess of jurisdiction, see PROHIBITION.
Increase of salary during term of state officers, see STATES, 1.

Opening:

Judgment, see JUDGMENT, 5, 6.

Opinion Evidence:

In civil actions, see EVIDENCE, 9.

Oral Contracts:

See FRAUDS, STATUTE OF.

Oral Evidence:

See EVIDENCE, 5-8.

Orders:

Review of interlocutory orders, see CERTIORARI.
Of public service commission requiring track connection between railroads, see RAILROADS, 1, 2.
Of public service commission to extend street car line, see STREET RAILROADS, 1.

Ordinances:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 7, 16.

Overcharge:

Recovery of by shipper, see CARRIERS, 5, 6.

Ownership:

Of goods at time of sale, see SALES, 4.

Parent and Child:

Rights of surviving parent under soldiers' bonus act, see ARMY AND NAVY.
Custody and support of children on divorce, see DIVORCE, 4, 5.

Parol Agreements:

Effect and requirements of statute of frauds, see FRAUDS, STATUTE OF.

Parol Evidence:

See EVIDENCE, 5-8.

Partial Invalidity:

Effect of partial invalidity of statutes, see STATUTES, 1.

Particulars:

Bill of, see PLEADING.

Parties:

Death as ground for abatement, see ABATEMENT AND REVIVAL, 2.
Persons entitled to appeal, see APPEAL AND ERROR, 2, 6.
Rights of parties to assignment, see ASSIGNMENTS.
In action to establish boundary line, see BOUNDARIES, 1.

Parties—Continued.

Persons entitled to compensation under soldiers' bonus act, see BOUNTIES.
Review of order requiring additional parties, see CERTIORARI.
Rights and liabilities as to costs, see COSTS.
Capacity to take by deed, see DEEDS, 1.
Admissions as evidence, see EVIDENCE, 2.
Declarations of third person as evidence, see EVIDENCE, 3.
Husband or wife, see HUSBAND AND WIFE, 4.
Persons concluded by judgment, see JUDGMENT, 7, 8.
Unlawful detainer of demised premises, see LANDLORD AND TENANT, 2, 3.
Persons entitled to chattel lien, see LIENS.
For sale of land for public improvement assessment, see MUNICIPAL CORPORATIONS, 6.

Partnership:

1. PARTNERSHIP (28)—LIABILITY BETWEEN PARTNERS—ACQUIRING ADVERSE INTEREST—FRAUD. The fact that one partner in a firm operating a billiard-room had a secret agreement with the lessor of the premises to enter into partnership with him to go into the same business on termination of the lease, does not render him liable to his copartners in damages, where it is not shown that the acts were wrongful or fraudulent or to prevent a renewal of the lease, notwithstanding the assets of the partnership were sold to the lessor without knowledge of the facts. *Stewart v. Ulrich*..... 109

Passengers:

Injury to passenger on street car, see CARRIERS, 7-9.

Payment:

As defense in other action pending, see ABATEMENT AND REVIVAL, 1.
Part payment as accord and satisfaction, see ACCORD AND SATISFACTION, 1.
Time for, see BILLS AND NOTES, 2, 3.
Of fees or costs of criminal appeal, see CONSTITUTIONAL LAW.
Presumptions as to payment of consideration, see DEEDS, 2.
As defense to enforcement of lien, see LIENS, 5.
Under agreement for partial release, see MORTGAGES, 3.
State appropriations, see STATES, 2.
Recovery of voluntary payment, see TELEGRAPHS AND TELEPHONES.
Price of land sold, see VENDOR AND PURCHASER, 7.

1. PAYMENT (11, 32)—APPLICATION—VOLUNTARY PAYMENT—RIGHT OF RECOVERY—EFFECT OF ASSIGNMENTS FOR SECURITY. Money voluntarily paid to a bank to be applied by it to a labor and material account due under a contract between the payor and the manufac-

Payment—Continued.

turer of machinery would not render the bank liable to the payor for a misapplication of part of the money to other indebtedness owed by the manufacturer to the bank, as in legal effect the payment in the first instance amounted to a payment to the manufacturer. *Prescott Co. v. Franklin Tool Works*..... 283

2. PAYMENT (24-1)—PRESUMPTIONS AND BURDEN OF PROOF—NOTES. In an action on a promissory note, the burden of proof, upon the plea of payment, is upon the defendant, but the question of whether payment has been made is one for the jury. *First International Bank of South Bend v. Rockey*..... 663

Pendency of Action:

As ground for abatement, see ABATEMENT AND REVIVAL, 1.

Performance:

Of contract of employment, see BROKERS.
Affecting operation of statute of frauds, see FRAUDS, STATUTE OF, 4.
Of contract for sale of land, see VENDOR AND PURCHASER, 6-10.

Personal Injuries:

To passenger, see CARRIERS, 7-9.
Measure of damages, see DAMAGES.
Expert evidence as to bodily appearance or condition, see EVIDENCE, 9.
From negligence in use of highway, see HIGHWAYS, 4-6.
Accident indemnity insurance, see INSURANCE.
To employee or third person, see MASTER AND SERVANT.
Collision with automobile, see MUNICIPAL CORPORATIONS, 10-15.
From defects or obstructions in street or public place, see MUNICIPAL CORPORATIONS, 17.
To traveler on highway crossing railroad, see RAILROADS, 3, 4.
To persons on or near street railroad tracks, see STREET RAILROADS, 2-4.

Personal Taxes:

See TAXATION, 1-5.

Petition:

To vacate decree for fraud, see DIVORCE, 2, 3.
To incorporate town, see MUNICIPAL CORPORATIONS, 1.

Physicians and Surgeons:

Opinion evidence by, see EVIDENCE, 9.

Place:

Criminal jurisdiction as dependent on locality of offense, see CRIMINAL LAW, 2.

Pleading:

Joinder of causes of action, see ACTION, 1.
Tender of amount due in action for agister's lien, see ANIMALS.
Presumption as to amendment, see APPEAL AND ERROR, 11, 16.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 16.
For damages in general, see DAMAGES, 4.
On petition to vacate decree for fraud, see DIVORCE, 2.
Damages for breach of mining lease, see ELECTION OF REMEDIES.
To enforce homestead rights, see HOMESTEAD, 5.
Conformity of judgment to pleadings, see JUDGMENT, 4.
To restrain enforcement of taxes, see TAXATION, 11.
Applicability of instructions to pleadings, see TRIAL, 3.

1. PLEADING (134, 136)—BILL OF PARTICULARS—RIGHT TO—EXCUSE—SUFFICIENCY OF COMPLAINT. In an action brought to recover a balance due on account, one item being for wages in the sum of $525, which did not set out the rate per month, or the months for which payment was delinquent, or payments made on account thereof, the plaintiff is precluded from giving evidence as to such item, under Rem. Code, § 284, where he fails to file a bill of particulars ordered by the court on demand of the defendant. *Ford v. Leschi Market & Grocery Co*..... 686

2. SAME (134)—DEMAND FOR PARTICULARS—WAIVER. Answer to a complaint on account, after failure of plaintiff to comply with an order for a bill of particulars, does not constitute a waiver of the demand by defendant. *Ford v. Leschi Market & Grocery Co*.... 686

Police Power:

Of municipality, see MUNICIPAL CORPORATIONS, 7.

Policy:

Of insurance, see INSURANCE.

Possession:

As affecting right to lien, see LIENS, 2.

Powers:

Of board of state law examiners, see ATTORNEY AND CLIENT, 1.
Of public service commission, see CARRIERS, 1, 5.
Of tax commissioner in assessing street railway property, see TAXATION, 2.
Of public service commission to change location of water mains in city street, see WATERS AND WATER COURSES.

Practice:

See APPEAL AND ERROR; APPEARANCE; CERTIORARI; DISMISSAL AND NONSUIT; DIVORCE; MANDAMUS; NEW TRIAL; PROHIBITION.
Condemnation proceedings, see EMINENT DOMAIN, 3.

Prejudice:

Ground in reversal in civil actions, see APPEAL AND ERROR, 16-23.
Of judge as ground for new trial, see NEW TRIAL, 1.

Premature Action:

In general, see ACTION, 2.

Presentment:

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 9.

Presumptions:

On appeal, see APPEAL AND ERROR, 11, 16.
As to consideration for deed, see DEEDS, 2.
As to community nature of property, see HUSBAND AND WIFE, 3.
As to negligence of master, see MASTER AND SERVANT, 2, 3.

Price:

Action by seller for price of goods, see SALES, 7.
Tender of purchase money, see VENDOR AND PURCHASER, 7.
Recovery of purchase money, see VENDOR AND PURCHASER, 8, 9.

Principal and Agent:

See BROKERS.
Authority of bank officers to make loans, see BANKS AND BANKING, 1.
Possession as agent of lessee as defense in unlawful detainer, see LANDLORD AND TENANT, 2.

Priorities:

Of tax titles, see TAXATION, 10.

Profits:

Personal profit in management of estate, see EXECUTORS AND ADMINISTRATORS, 4.

Prohibition:

1. PROHIBITION (15, 20, 37)—TO OFFICERS—WANT OR EXCESS OF JURISDICTION—RETURN OR ANSWER—EFFECT OF DEMURRER. Prohibition lies against the director of public works where he is threatening, without or in excess of his jurisdiction, to accept insurance policies issued by an automobile insurance exchange which has no articles of incorporation and is not licensed to do business in the state, in violation of Laws 1921, p. 341, § 5, which requires for hire owners or operators to furnish security by an insurance company licensed to write liability insurance in the state of Washington, or a surety bond of a company licensed to write surety bonds in the state. *State ex rel. Gillespie v. Kuykendall*..... 415

Promise:

To pay debt of another, see FRAUDS, STATUTE OF, 1.

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Property:

Taking for public use, see EMINENT DOMAIN.
Exempt from execution, see EXEMPTIONS.
Subject to garnishment, see GARNISHMENT.
Subject to claim of homestead, see HOMESTEAD, 2.
Separate or community character of, see HUSBAND AND WIFE, 3-5.
Protection of rights of property by injunction, see INJUNCTION.
Division on annulment of marriage, see MARRIAGE, 2.
Recovery of stolen property, see REPLEVIN.

Proximate Cause:

Of injury to passenger as question for jury, see CARRIERS, 9.
Of injury to person in city street, see MUNICIPAL CORPORATIONS, 14.

Public Debt:

See STATES, 2.

Public Improvements:

By cities, see MUNICIPAL CORPORATIONS, 3-6.

Public Policy:

Contracts against public policy, see CONTRACTS, 3.

Public Service Commission:

Power to determine status of railroad as common carrier, see CARRIERS, 1.
Regulation of rates for electricity, see ELECTRICITY.
Order directing track connection between two railroads, see RAILROADS, 1, 2.
Order of to extend street car line, see STREET RAILROADS, 1.
Interference with location and security of water mains in city street, see WATERS AND WATER COURSES.

Public Use:

Taking property for public use, see EMINENT DOMAIN.

Qualifications:

Of administrator, see EXECUTORS AND ADMINISTRATORS, 1-3.

Quantity:

Of goods sold, construction of contract, see SALES, 1.

Question for Jury:

In action for injuries to passenger, see CARRIERS, 7-9.
Contributory negligence of driver of automobile as question for jury, see HIGHWAYS, 5.
Negligence in driving automobile, see MUNICIPAL CORPORATIONS, 12, 13.
In action for injuries from snow and ice on sidewalk, see MUNICIPAL CORPORATIONS, 17.
Payment as question for jury, see PAYMENT, 2.
Negligence at crossing, see RAILROADS, 3.

Railroads:

Carriage of goods and passengers, see CARRIERS.
Railroads in city streets, see STREET RAILROADS.
Taxation of railroad property, see TAXATION, 1-4.

1. RAILROADS (9)—PHYSICAL CONNECTIONS—PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY. The question of public necessity and reasonableness of an order of the public service commission requiring a physical connection of the tracks of two railroads, made pursuant to Rem. Code, § 8626-61, is determinable by the courts by a consideration of the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. *Northern Pac. R. Co. v. Public Service Commission*..... 593

2. SAME (9). On a writ to review an order of the public service commission directing a physical connection between two railroads, it is held that the evidence fails to show a public necessity for the track connection. *Northern Pac. R. Co. v. Public Service Commission* 593

3. RAILROADS (64, 71)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether one driving an automobile towards a country railway crossing at from eight to ten miles an hour could have seen or heard a rapidly approaching passenger train coming through a cut close to the crossing, presents a question for the jury, where there was testimony that no whistle was sounded or bell rung nor any noise of the train noticeable, and that plaintiff kept a sharp lookout from the time he was within fifty feet of the crossing, but did not see the train until within about ten feet of the track, when it was too late to stop his car short of the nearest rail of the track. *Petry v. Hines*..... 175

4. RAILROADS (66)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—FAILURE TO CONTROL SPEED OF TRUCK. A truck driver, killed as the result of a collision with a passenger train on a country road crossing, was guilty of contributory negligence barring recovery for his death, where the evidence showed his familiarity with the crossing, its surroundings and attendant dangers; that

Railroads—Continued.

there was a zone of safety before reaching the track of thirty to thirty-five feet, within which he could have seen the approaching train free of all obstruction to his view, and within which he could have stopped his truck; that he failed to heed a warning given by a section foreman, but continued his course without effort to control the speed of the truck until he had passed onto the crossing, when it was too late to do other than try to speed it up in an effort to save himself. *Loughnan v. Hines*..... 166

Rates:

For carriage of freight, see CARRIERS, 5, 6.
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Excessive charges for telephone service, see TELEGRAPHS AND TELEPHONES.

Real Estate Agents:

See BROKERS.

Real Property:

Sale of by broker, see BROKERS.
Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF, 2, 3.
Contracts for conveyance, see VENDOR AND PURCHASER.

Records:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 8, 9.

Redemption:

From mortgage foreclosure, see MORTGAGES, 4.

Reference:

See ARBITRATION AND AWARD.

Regulation:

Of rates by carrier, see CARRIERS, 5, 6.
Of rates for electric power, see ELECTRICITY.
Of street railroads, see STREET RAILROADS, 1.

Rehearing:

See NEW TRIAL.

Reinstatement:

Of cause after dismissal, see DISMISSAL AND NONSUIT.

Release:

See ACCORD AND SATISFACTION.
Partial release of mortgage, see MORTGAGES, 3.

Reliance:

On fraudulent statements, see FRAUD.

Remand:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 26.

Remoteness:

As affecting admission of evidence, see EVIDENCE, 1.

Removal:

Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 2.
Of public officers or employees, see MUNICIPAL CORPORATIONS, 2.
Of teachers, see SCHOOLS AND SCHOOL DISTRICTS.

Rent:

Agreement to reduce rent, see ACCORD AND SATISFACTION, 2.
Modification of rental charge in lease, see LANDLORD AND TENANT, 1.

Repeal:

Of statute, see STATUTES, 3.

Replevin:

1. REPLEVIN (35)—TITLE AND RIGHT TO POSSESSION—IDENTITY OF PROPERTY—EVIDENCE—SUFFICIENCY. An action of replevin to recover a stolen automobile which had been sold to an innocent purchaser is sustained by proof that the factory and motor numbers on the car were the same as on the car which had been stolen; and by the further testimony of the thief that he had sold the car to the defendant. *California Insurance Co. v. Alpin*..... 159

Requests:

Necessity for requests to review instructions, see APPEAL AND ERROR, 4.
Harmless error in refusal of instructions, see APPEAL AND ERROR, 22, 23.

Rescission:

Of contract, see CONTRACTS, 4; SUBSCRIPTIONS.
Of contract for mistake of fact, see EQUITY.

Res Judicata:

See JUDGMENT, 7, 8.
Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 24, 25.

Restraint of Trade:

Contracts in restraint of trade, see CONTRACTS, 3.

Revenue:

See TAXATION:

Review:

In civil actions, see APPEAL AND ERROR.
Scope and extent, see CERTIORARI.
Of condemnation proceedings, see EMINENT DOMAIN, 3.
Of assessment for highway improvement, see HIGHWAYS.
Of acts removing civil service employee, see MUNICIPAL CORPORATIONS, 2.

Revocation:

Of broker's authority as affecting right to compensation, see BROKERS, 1.
Of letters testamentary, see EXECUTORS AND ADMINISTRATORS, 2.

Risks:

Limitation of and liability of insurer under accident policy, see INSURANCE, 1, 2.

Roads:

Streets in cities, see MUNICIPAL CORPORATIONS, 3, 8-13.

Royalties:

Under coal mining lease, see MINES AND MINERALS.

Salary:

Increase during term of office, see STATES, 1.

Sales:

Loss of goods by carrier as defense in action on notes, see BILLS AND NOTES, 5.
Parol evidence to vary contract of sale, see EVIDENCE, 6.
Fraud inducing sale, see FRAUD, 1.
Sale of stock in bulk as fraudulent as to creditors, see FRAUDULENT CONVEYANCES, 1.
For nonpayment of tax for public improvements, see MUNICIPAL CORPORATIONS, 5, 6.
Tax sales, see TAXATION, 6-8.
Of real property, see VENDOR AND PURCHASER.

1. SALES (29) — CONSTRUCTION OF CONTRACT — SUBJECT-MATTER — QUANTITY AND ASCERTAINMENT THEREOF. Where defendant offered to supply the trade with a certain kind of cabbage in carload lots and plaintiff submitted an order for five carloads, subject to confirmation, to which defendant replied "will start shipping cabbage as per your letter 13th, but may not have full five cars to supply. Will furnish as many cars as we have," which was accepted by plaintiff, there was a contract between the parties, binding only

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to the extent of one carload. *Pearce v. Puyallup & Sumner Fruit Growers' Canning Co.*..... 612

2. SALES (88)—OPERATION AND EFFECT—WHEN TITLE PASSES—DELIVERY TO CARRIER. A c.i.f. contract, although the term may be used in connection with the price of the commodities sold, is one passing title to the buyer on delivery of the commodities to the carrier, and he cannot hold the seller liable for injuries to the goods in transit. *Northern Grain Warehouse Co. v. Northwest Trading Co.*..... 422

3. SAME (88)—SHIPPING DOCUMENTS—DELIVERY OF BILL OF LADING. Delivery of shipping documents and insurance policies covering a shipment of goods under a c.i.f. contract need not be made until a reasonable time after shipment, in order to complete the transaction. *Northern Grain Warehouse Co. v. Northwest Trading Co.*..... 422

4. SAME (88) — DELIVERY TO CARRIER — OWNERSHIP OF GOODS — PURCHASE AND RESALE BY VENDOR. The fact that a trading company is not the owner of goods at the time of sale, but fills the order by purchase in a foreign market, will not affect the question of the passing of title to the buyer from the trading company as of the date of delivery to the carrier. *Northern Grain Warehouse Co. v. Northwest Trading Co.*..... 422

5. SAME (92)—CONTRACT—GOODS TO BE MANUFACTURED—TRANSFER OF TITLE. The general rule that no title vests in the purchaser under a contract for the manufacture of an article not existing in specie at the time of making the contract is not altered by the fact that the purchaser has a right to inspect all material and pass upon workmanship before installation, or is required to make payments as the work progresses, or that provision is made for a lien in favor of the manufacturer in the event of default in final payment for the article. *Prescott Co. v. Franklin Tool Works*..... 283

6. SALES (105)—IMPLIED WARRANTY—SUITABILITY FOR PURPOSE—CONTRACT—PERFORMANCE. When an article is manufactured for a buyer in accordance with designated specifications, or an article of a standard kind, well known to the trade, is ordered, there is no implied warranty of reasonable fitness for the intended purpose, even though the seller knows the purpose for which it is intended and it afterwards prove unsuitable therefor. *United States Cast Iron Pipe & Foundry Co. v. Ellis*..... 601

7. SAME (127, 133)—REMEDIES OF SELLER—ACTION FOR PRICE—DEFENSES — DEFECT IN GOODS SOLD — EVIDENCE — SUFFICIENCY. In an action to enforce a materialman's lien for cast iron water pipe furnished a public contractor, the latter is not entitled to set off the expense of replacing joints of pipe which broke after being put in place, where the evidence was not sufficient to justify the conclusion the pipe broke because of defects in manufacture, but rather

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raised an inference that the breaking was due to method of installation on the steel cross beams supporting it. *United States Cast Iron Pipe & Foundry Co. v. Ellis*..... 601

8. SALES (156)—BREACH OF CONTRACT—FAILURE TO DELIVER—MEASURE OF DAMAGES. The measure of damages for breach of contract for the sale of shingles being the difference between the contract price and the market price at the time of the seller's breach, recovery may be had based upon the price in the following August, when there was an unequivocal refusal to perform, although they should have been delivered within a reasonable time. *Coast Fir Lumber Co. v. Puget Sound Mills & Timber Co*..... 515

9. SAME (156)—ACTIONS FOR BREACH—FAILURE TO DELIVER—MEASURE OF DAMAGES. On breach of a contract of sale of fifteen tons of cabbage, the measure of damages for failure to deliver is the difference between the market price on the date the cabbage should have been delivered and the market value at the time of the seller's breach. *Pearce v. Puyallup & Sumner Fruit Growers' Canning Co.* 612

10. SALES (179-1)—CONDITIONAL SALES—ASSIGNMENT OF CONTRACT—EFFECT. An unconditional bill of sale by a conditional sales vendor to his vendee passes absolute title which is not divested by his subsequent assignment of the conditional bill of sale. *Bowen v. Rury* 30

11. SAME (182)—REMEDIES OF SELLER—ELECTION—WAIVER OF RIGHT TO RETAKE PROPERTY. An action on a note secured by a conditional bill of sale is an election which waives the right to retake the property. *Bowen v. Rury*..... 30

Satisfaction:

See ACCORD AND SATISFACTION.

Schedule:

Of carrier's charges, see CARRIERS, 5.

Schools and School Districts:

1. SCHOOLS AND SCHOOL DISTRICTS (51)— TEACHERS — REMOVAL — NOTICE AND HEARING—SUFFICIENCY. The action of a board of school directors in discharging a teacher after consideration of charges against her was upon sufficient notice, assuming the necessity of notice under Rem. Code, § 4481, where she had two hearings before the board, did not dispute the facts, had agreed to resign, and had demanded no further hearing. *Andrus v. Church*..... 627

2. SAME (52)—REMOVAL—ACTION FOR DAMAGES. A school teacher who has been discharged by a board of school directors without sufficient cause has a right of action for damages for breach of contract. *Andrus v. Church*..... 627

Separate Estate:

Of married women, see HUSBAND AND WIFE, 3, 5.

Separation:

Of jury, see TRIAL, 5.

Servants:

See MASTER AND SERVANT.

Set-Off and Counterclaim:

Effect of pendency of other action, see ABATEMENT AND REVIVAL, 1.
Right of assignor of claim to set-off, see ASSIGNMENTS.
In action on bill or note, see BILLS AND NOTES, 4.

Settlement:

See ACCORD AND SATISFACTION.
By executor or administrator, see EXECUTORS AND ADMINISTRATORS, 4, 10-12.
Of account as affecting right to interest, see INTEREST.

Shares:

Of corporate stock, see CORPORATIONS.

Sidewalks:

Injuries from snow and ice on sidewalk, see MUNICIPAL CORPORATIONS, 17.

Snow:

Accidents due to snow on streets, see MUNICIPAL CORPORATIONS, 17.

Soldiers' Bonus:

Rights of surviving parent, see ARMY AND NAVY.
Persons entitled to, see BOUNTIES.
Appropriation for payment of claims, see STATES, 2.
Effect of partial invalidity of act, see STATUTES, 1.

Special Appearance:

See APPEARANCE.

Speed:

Violation of ordinance by driver of auto, see MUNICIPAL CORPORATIONS, 12, 13.

Stare Decisis:

See COURTS.

State Auditor:

Duties of under soldiers' bonus act, see BOUNTIES, 3.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 8, 9.

States:

Duties of state auditor under soldiers' bonus act, see BOUNTIES, 3.
Prohibiting acts of officers in excess of jurisdiction, see PROHIBITION.

1. STATES (11)—OFFICERS (43)—SALARY—INCREASE DURING TERM—APPOINTEE FOR UNEXPIRED TERM—STATUTES. Under Const., art. IV, §§ 3, 13, fixing the terms of judges of the supreme court at six years from and after the second Monday in January next succeeding their election, and providing that the salaries of such judges "shall not be increased after their election, nor during the term for which they shall have been elected," on the death of an incumbent who was barred from receiving the statutory increase during the term for which he was elected, a judge appointed to fill his unexpired term comes within the same constitutional inhibition against increase "during the term" for which his predecessor had been elected. *State ex rel. Hovey v. Clausen*..... 475

2. STATES (22, 25)—PUBLIC DEBT—SOLDIERS' BONUS ACT—ISSUANCE OF BONDS—AUTHORITY OF STATE BOARD—STATUTES—CONSTRUCTION. Under art. 8, § 2, of the state constitution authorizing the incurring of indebtedness, without any limitation, for conditions arising out of war, and Laws 1920, Ex. Sess., ch. 1, §§ 6, 7, which appropriate a definite sum derivable from a sale of state bonds, to pay equalized compensation for services in the European war, and further provides that, in case such sum be insufficient to pay the compensation allowed, additional bonds be issued and sold for the purpose, a definite appropriation of public money was made involving no delegation of legislative power, since the amount necessary is simply a mathematical proposition determinable from the public records. *State ex rel. Hart v. Clausen*..... 260

State Tax Commission:

Assessment of street railway property, see TAXATION, 2.

Statutes:

See EXEMPTIONS; FRAUDS, STATUTE OF.
Rights of surviving parent under soldiers' bonus act, see ARMY AND NAVY.
Clients' recovery of money or papers, see ATTORNEY AND CLIENT, 2.
Negotiability of promissory notes, see BILLS AND NOTES, 2, 3.
Construction of soldiers' bonus act, see BOUNTIES.
Contracts in violation of statute, see CONTRACTS, 2.
Liability of county for expenses and charges of investigation of application of attorney to practice, see COSTS.
Appointment of administrator, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Statutes—Continued.

Allowance to surviving spouse, see EXECUTORS AND ADMINISTRATORS, 5-8.

Construction of bulk-sales law, see FRAUDULENT CONVEYANCES, 1.

Assessment for highways, see HIGHWAYS.

Homestead laws, see HOMESTEAD, 1, 3.

Statutory liens, see LIENS, 1, 2, 4.

Statutes of limitation, see LIMITATION OF ACTIONS.

Mandamus as mode of determining constitutionality of statute, see MANDAMUS, 1.

Incorporation of cities and towns, see MUNICIPAL CORPORATIONS, 1.

Assessment for public improvements, see MUNICIPAL CORPORATIONS, 4, 5.

Construction of tax laws, see TAXATION, 1, 2, 5.

1. STATUTES (9)—EFFECT OF PARTIAL INVALIDITY. The fact that the soldiers' bonus act (Laws 1920, Ex. Sess., p. 7, § 1) can be construed by its language as including payments to persons not entitled thereto does not render the act inoperative as to those who are entitled to its benefits. *Maximillian v. Clausen*..... 74

2. STATUTES (24)—SUBJECTS AND TITLES—TAXATION—ASSESSMENT OF RAILROAD PROPERTY. The word "railroad" in the title of an act for the assessment of the operating property of railroads (Laws 1907, p. 132, ch. 78, and the amendatory act, Laws 1911, p. 62, ch. 21) which, in accordance with modern usage, generally covers street railways, is defined by the act itself (Laws 1907, ch. 78, § 2, subd. 6) as including street railways, and therefore the title is broad enough to cover the assessment of street railway property. *Puget Sound Power & Light Co. v. Seattle*..... 351

3. STATUTES (47)—REPEALS—AMENDMENT OF ACT. Where a section of a code is amended "to read as follows," any matter in the original section not reincorporated in the amendatory section is thereby repealed; hence the right of appeal under the Donohue Road Law (Rem. & Bal. Code, § 5744) was abrogated by later amendment and re-enactment of § 5744, which omitted all matters connected with appeals. *Adams County v. Scott*..... 85

4. STATUTES (67)—EXECUTIVE CONSTRUCTION. The construction of a statute by executive officers in a way other than its language plainly imports is not controlling on courts when called upon to determine its meaning. *Schoen v. Seattle*..... 303

Stenographers:

Fees as costs, see COSTS.

Stock:

Corporate stock, see CORPORATIONS.

Stockholders:

Of corporations, see CORPORATIONS.

Street Railroads:

Injuries to passengers, see CARRIERS, 7-9.
Sufficiency of title of act for assessment of railroad property, see STATUTES, 2.
Taxation of street railroads, see TAXATION, 1-4.

1. STREET RAILROADS (9-1)—REGULATION—EXTENSION OF CAR LINE—ORDER OF PUBLIC SERVICE COMMISSION—ARBITRARINESS. An order of the public service commission directing a street railway company to extend its line a distance of 900 feet is arbitrary and unreasonable, where its only purpose is to serve a lumber mill in the carriage of lumber cars, there being no other property to serve than the one mill, and that the cost of extension and operation for the mill service would cause an annual loss to the railway company. *State ex rel. Willapa Electric Co. v. Public Service Commission*..... 510

2. SAME (33)—INSTRUCTIONS—MANAGEMENT OF CAR. An instruction in an action for personal injuries resulting to an occupant of an automobile from a collision with a street car which tells the jury that if the motorman "after he saw the plaintiff drive said automobile near the tracks in front of said car, before the car struck him, used such care and diligence as an ordinarily prudent and careful person would have used under the circumstances in which he was placed to slacken the speed of the car in time to avoid the collision then there was not negligence on the part of the defendant," is erroneous as being confusing and assuming that the motorman saw the automobile in the position indicated. *Reed v. Tacoma R. & Power Co.* 547

3. STREET RAILROADS (34)—ACTIONS FOR INJURIES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for injuries resulting from a collision between a street car and an automobile, an instruction that if the driver of the automobile erred in thinking she had time to drive upon the car tracks and off again before the car reached her, while in fact she did not have sufficient time, she could not recover, was erroneous, since error of judgment is not necessarily negligence. *Reed v. Tacoma R. & Power Co*..... 547

4. SAME (34)—INSTRUCTIONS—FAMILIARITY WITH LOCATION. Familiarity or lack of familiarity by the driver of an automobile with the location and situation of street car tracks and the several streets at the place of a collision between a street car and an automobile has nothing to do with the question of the driver's contributory negligence in driving on a car track in front of an approaching street car. *Reed v. Tacoma R. & Power Co*..... 547

Streets:

See MUNICIPAL CORPORATIONS, 3, 8-13.
Negligent use of highway, see HIGHWAYS, 4-6.

Submission of Controversy:

To arbitrators by agreement of parties, see ARBITRATION AND AWARD.

Subscriptions:

To corporate stock, see CORPORATIONS, 1.

1. SUBSCRIPTIONS (3) — CONTRACT — LIABILITY — RIGHT TO RESCIND AGREEMENT. Subscribers to a Chautauqua course of entertainment to be given in their town as part of a circuit have no right to revoke the contract, since the contract in suit, with like contracts, forms the consideration for the overhead cost of the undertaking and the expense of employing lecturers and entertainers for the course. *Ellison v. Keith*..... 648

Supersedeas:

On appeal or writ of error, see APPEAL AND ERROR, 7.

Support:

Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS, 5-8.

Survival:

Of cause of action, see ABATEMENT AND REVIVAL, 2.

Taxation:

Validity of contract to purchase delinquency certificates, see CONTRACTS, 2.
For highway purposes, see HIGHWAYS.
Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 4-6.
Sufficiency of title of act for assessment of railroad property, see STATUTES, 2.

1. TAXATION (71)—EQUALITY AND UNIFORMITY—STREET RAILROADS—MODE OF ASSESSMENT. Laws 1911, p. 62, ch. 21 (amending § 12 of Laws 1907, ch. 78), providing that "all the operating property of street railroads shall be assessed and taxed as personal property," does not, by the inclusion of both real and personal property under the classification "operating property," violate either the equal protection clause of the Federal constitution or the uniformity of taxation sections of the state constitution, inasmuch as the classification of property for assessment is a matter of legislative policy, provided uniformity and equality exist in the classes. *Puget Sound Power & Light Co. v. Seattle*..... 351

2. SAME (71) — RAILROAD PROPERTY — ASSESSMENT — PROCEEDINGS—POWERS OF TAX COMMISSIONER—STATUTES—DIRECTORY OR MANDATORY

Taxation—Continued.

PROVISIONS. The fixing of the assessment of street railway property by the tax commissioner, prior to the filing of reports by a railway company as enjoined by statute, was not violative of the equal protection and due process clauses of the Federal constitution, since its duty to make report was directory and not mandatory upon the tax commissioner. *Puget Sound Power & Light Co. v. Seattle*..... 351

3. TAXATION (105)—PERSONAL PROPERTY—LIEN ON REAL PROPERTY. A personal property tax against a taxpayer casts no cloud upon his real estate until the county treasurer, acting under authority of Rem. Code, § 9245, selects specific real property and charges it with the lien of the personal property tax. *Puget Sound Power & Light Co. v. Seattle*..... 351

4. SAME (105, 107)—PERSONAL PROPERTY—LIEN—WHEN ATTACHES—TRANSFER OF PROPERTY. Under Rem. Code, § 9235, providing that taxes assessed on personal property shall be a lien from the date of assessment, a municipality which acquires a street railway property by purchase subsequent to the time such lien attaches takes the property, like an individual, subject to the lien of such tax. *Puget Sound Power & Light Co. v. Seattle*..... 351

5. TAXATION (107)—PERSONAL PROPERTY—LIEN—TRANSFER OF PROPERTY—STATUTES—CONSTRUCTION. Rem. Code, § 9235, providing that taxes assessed upon real and personal property cannot be affected in any way by sale or transfer of the property, must be construed as inapplicable with respect to personal property, in view of Rem. Code, § 9223a, which provides for the collection of delinquent personal property taxes by distraint of "sufficient goods and chattels belonging to the person charged with such taxes to pay the same." *Raymond v. King County*..... 343

6. TAXATION (140)—FORECLOSURE SALE—NOTICE TO OWNER—DILIGENCE. The statute (Rem. Code, § 9260) requiring the county treasurer to notify the record owner of real estate before its sale for delinquent taxes, while not requiring him at all hazards and in all instances to search out and notify the record owner, is imperative that he make at least a reasonable effort to find and notify such owner. *Walter v. Hoeffler*..... 120

7. SAME. The owner of real estate is entitled to have a tax deed thereon set aside, where the treasurer has made a sale for delinquent taxes without notifying such owner whose post office address was of record in the treasurer's office, and was also capable of ascertainment from a tenant in possession of the premises; the fact that the owner himself may have been at fault not excusing the fault of the officer making the sale. *Walter v. Hoeffler*..... 120

8. TAXATION (147, 161)—FORECLOSURE OF CERTIFICATES—CONDITIONS PRECEDENT—SCOPE AND EXTENT OF RELIEF. Where a holder of a

Taxation—Continued.

certificate of delinquency does not pay local assessments before foreclosing, he elects to take subject to the local assessments; and the court has power to grant only the statutory relief, which will be read into the decree, its terms going beyond it and barring all such claims being of no force. *Schroeder v. Raymond*..... 238

9. SAME (177)—TAX DEEDS—TITLE ACQUIRED—MERGER OF ESTATES. The fact that the holder of a tax certificate took a quitclaim deed to the property from the owners before the period of redemption had expired, would not constitute a merger of the title under tax deed with that acquired by deed from the owners. *Fidelity Securities Co. v. Dickinson*..... 323

10. TAXATION (191)—TAX TITLES—PRIORITY OVER PRIOR MORTGAGE. One acquiring property under a tax deed assumes no obligation to a mortgagee of the property to pay off the taxes accumulated subsequent to his mortgage, and therefore a tax title is superior to the lien of a prior mortgage. *Fidelity Securities Co. v. Dickinson*.. 323

11. SAME (222)—EQUITY (78)—ENJOINING COLLECTION OF TAX—DECREE—PLEADINGS AND ISSUES. In an action by a street railway company to restrain the collection of taxes on property sold by it to a city and to have the tax cancelled as a cloud upon the title to other real property, in which the city as defendant admitted the allegations of the complaint, and in a cross-complaint alleged essentially the same facts and prayed for the same relief, there was no issue between the company and the city as to the apportionment of the tax if valid, and the court was not required to adjudicate the portions due respectively from each. *Puget Sound Power & Light Co. v. Seattle*..... 351

Teachers:

See SCHOOLS AND SCHOOL DISTRICTS.

Telegraphs and Telephones:

1. TELEGRAPHS AND TELEPHONES (7)—EXCESSIVE CHARGES—RIGHT TO RECOVER—VOLUNTARY PAYMENT. Excess charges for telephone service, paid without protest, cannot be recovered by a subscriber where they were not made under a mistake of fact, nor induced by fraud, nor made under the exigencies of business which would sustain loss if the payments were not made. *Cavers v. Home Telephone & Telegraph Co*..... 299

Tender:

Of amount due in action for agister's lien, see ANIMALS.

Of price of land, see VENDOR AND PURCHASER, 7.

Of performance by vendor after suit is brought for damages, see VENDOR AND PURCHASER, 9.

Termination:

Of contract of employment, see BROKERS, 1.

Time:

Of commencement of action, see ACTION, 2.
For taking appeal or suing out writ of error, see APPEAL AND ERROR, 6.
For filing statement of facts on appeal, see APPEAL AND ERROR, 8, 9.
For payment of note, see BILLS AND NOTES, 2, 3.
For claiming homestead, see HOMESTEAD, 3, 4.
From which interest runs, see INTEREST, 2.
For application to vacate judgment, see JUDGMENT, 6.
For filing lien claim, see LIENS, 4.
For presentation of claim against city, see MUNICIPAL CORPORATIONS, 22.
Of commencement of tax lien, see TAXATION, 4.

Title:

To property claimed as homestead, see HOMESTEAD, 2.
Of purchaser of mortgaged property, see MORTGAGES, 1.
Sufficiency of title to support replevin, see REPLEVIN.
Transfer of title on sale of goods, see SALES, 2-5, 10.
When passes under conditional sale delivery, see SALES, 10.
Of statutes, see STATUTES, 2.
Tax titles, see TAXATION, 9, 10.
Sufficiency of title of vendor of land, see VENDOR AND PURCHASER, 6, 8.

Torts:

See FRAUD.
Joinder of causes of action, see ACTION, 1.
Negligence of bailee, see BAILMENT.
Of bank officers, see BANKS AND BANKING, 1.
In carriage of passengers, see CARRIERS, 7-9.
By corporate officers, see CORPORATIONS, 2.
Measure of damages, see DAMAGES.
Negligence in use of highway, see HIGHWAYS, 4-6.
Liability of city, see MUNICIPAL CORPORATIONS, 16-19.
Defects in city water meter, see MUNICIPAL CORPORATIONS, 18, 19.
Liability between partners, see PARTNERSHIP.
Injuries caused by operation of street cars, see STREET RAILROADS, 2-4.

Towns:

Proceedings for incorporation, see MUNICIPAL CORPORATIONS, 1.

Tracks:

Compelling physical connection between two railroads, see RAILROADS, 1, 2.

Trade:

Contracts in restraint, see CONTRACTS, 3.

Trade Acceptance:

See BILLS AND NOTES, 2, 3.

Transfer:

Of personal property, see TAXATION, 4, 5.

Trial:

Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 3-5.

Review of failure to give instruction as dependent on request for same in lower court, see APPEAL AND ERROR, 4.

Scope and extent of review as dependent on theory of case, see APPEAL AND ERROR, 10.

Review of discretionary action, see APPEAL AND ERROR, 12.

Review of findings in trial by court, see APPEAL AND ERROR, 13-15.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 16-23.

Submission of controversy to arbitration, see ARBITRATION AND AWARD.

Instructions as to damages, see DAMAGES, 3, 4.

Instructions in action for damages from automobile collision, see HIGHWAYS, 4.

Judgment notwithstanding verdict, see JUDGMENT, 1, 3.

Instructions in action to recover royalties under mining lease, see MINES AND MINERALS, 2.

Instructions in actions for injuries from automobile in city street, see MUNICIPAL CORPORATIONS, 10, 11, 14, 15.

Instructions in action for damages from defective water meter, see MUNICIPAL CORPORATIONS, 18, 19.

Motions and grounds for new trial, see NEW TRIAL.

Instructions in action for injuries from collision of auto with street car, see STREET RAILROADS, 2-4.

Competency and examination of witnesses, see WITNESSES.

1. TRIAL (25)—RECEPTION OF EVIDENCE—NUMBER OF WITNESSES—DISCRETION OF COURT. It is not an abuse of discretion to limit the number of defendant's witnesses to four or five in an action for divorce on the ground of cruelty, where the testimony of the witnesses excluded would not have been addressed to a direct refutation of plaintiff's charges, but would have been confined to the fact that they had seen nothing wrong in the conduct of defendant. *Schoblom v. Schoblom* 67

2. TRIAL (88)—INSTRUCTIONS—CONFUSED OR MISLEADING INSTRUCTIONS. An instruction that a mining lease is so voluminous that it

Trial—Continued.

is only necessary to direct the jury's attention to a few of its provisions which are directly involved was not misleading, where many of its features were not germane to the issues, and the lease was in evidence and the jury was charged to decide the issues on all the evidence in the case. *Oliver v. Polson*..... 385

3. TRIAL (93)—INSTRUCTIONS—APPLICATION TO CASE—PLEADING AND PROOF. Where the acts of negligence charged in the complaint in an action for damages by a pedestrian struck by a motor truck were that the vehicle was operated at excessive speed and without giving warning, it was error for the trial court in its instruction to inject the issue of insufficient brakes, where it was nowhere raised in the pleadings or proof. *Eddy v. Spelger & Hurlbut*..... 632

4. TRIAL (107)—EXCEPTIONS TO INSTRUCTIONS—MODE OF MAKING. Exceptions to instructions given need not specifically point out the errors therein, under Rem. Code, § 384, which requires only that the particular instruction or part of instruction be pointed out. *Reed v. Tacoma R. & Power Co*..... 547

5. TRIAL (118)—MISCONDUCT OF JURY—SEPARATION. Separation of the jury allowed by the court after argument of counsel and instruction by the court, but before they had retired for deliberation was not error, in view of Rem. Code, § 349. *Poole's Seed & Implement Co. v. Rudene*..... 150

6. TRIAL (150)—FINDINGS—DUTY TO MAKE—EQUITABLE ACTION. Where an action is of equitable cognizance, instead of one at law, no findings of fact and conclusions of law are necessary on the part of the trial court. *Wentworth v. Perrizo*..... 191

Trover and Conversion:

Conversion of stock by corporation, see CORPORATIONS, 1.

Trusts:

Officer acquiring adverse interests as trustee for corporation, see CORPORATIONS, 2.

1. TRUSTS (38½)—ACTIONS—EVIDENCE—BURDEN OF PROOF. The burden of proving immaculate faith in transactions between a trustee and a *cestui que trust* rests upon the trustee, especially where the *cestui que trust* is of immature age, judgment and experience. *Hemrich v. Hemrich*..... 124

2. TRUSTS (44-1)—COMPENSATION—CHARGES—COUNSEL FEES. Counsel fees incurred in necessary litigation will be imposed by equity upon a trust fund for the benefit of which litigation is successfully maintained, in all cases of good faith on the part of the attorneys rendering the service and of the parties employing them. *Drain v. Wilson*..... 34

Trusts—Continued.

3. TRUSTS (46, 47)—ENFORCEMENT OF TRUST—RIGHT TO TRUST FUNDS —FRAUD OF TRUSTEE. Undue influence and constructive fraud is shown supporting an action by the widow of the *cestui que trust* to recover a trust estate, where it appears that a mother, who had been made trustee of an estate under the will of her deceased husband, whereby two-thirds was devised to the children, induced a child of no business experience or judgment, and who was under her influence, to convey his entire interest, amounting to practically $100,000, to her without other consideration than that of support and the prospect of sharing in the mother's estate on her death. *Hemrich v. Hemrich* 124

4. SAME (49)—ACTIONS TO ENFORCE TRUST—LIMITATION AND LACHES. A delay of four years in bringing action to set aside a conveyance procured by parent from child by means of constructive fraud and undue influence does not amount to laches when no injury has been caused by not beginning the action earlier. *Hemrich v. Hemrich* 124

Tuberculosis:

As avoiding promise to marry, see BREACH OF MARRIAGE PROMISE.

Undue Influence:

Procuring making of will, see WILLS, 1.

Uniformity:

Of taxes, see TAXATION, 1.

Unlawful Detainer:

See LANDLORD AND TENANT, 2, 3.

Vacation:

Of erroneous order as affecting time for appeal, see APPEAL AND ERROR, 6.
Of divorce decree for fraud, see DIVORCE, 2, 3.
Of judgment, see JUDGMENT, 5, 6.
Of tax deed, see TAXATION, 7.

Vendor and Purchaser:

Employment of broker to sell lands, see BROKERS.
False representations in sale of land, see FRAUD, 3.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.
Transfer of mortgaged property, see MORTGAGES, 1-3.
Transfers of ownership of personal property, see SALES.

1. VENDOR AND PURCHASER (15, 18)—FRAUD—MISREPRESENTATIONS. Where a party upon a sale or exchange of property undertakes to show his land to a prospective purchaser, he is bound to show the land he owns and its boundaries, if required, under penalty of responding in damages or to an action in rescission; and the vendor

Vendor and Purchaser—Continued.

cannot evade responsibility on the score of being ignorant of the exact location of his own land. *Stevens v. Sweitzer*..... 420

2. VENDOR AND PURCHASER (53)—RESCISSION BY VENDOR—ELECTION TO RESCIND AND NOTICE. Under a contract for the sale of land, which provided that there should be no forfeiture unless ten days' notice were given the purchaser, a failure to give such notice and the giving instead one abrogating the contract, entitled the purchaser to rescind and sue for damages. *Finch v. Sprague*..... 650

3. VENDOR AND PURCHASER (60)—RESCISSION BY PURCHASER—FRAUD—EVIDENCE—SUFFICIENCY. Rescission of an exchange of properties is properly decreed where the evidence shows that by collusion between one of the parties and the broker representing both parties the value of one of the properties which was situated in another county was grossly misrepresented by its owner and the broker. *Wisner v. Carter*..... 623

4. SAME (64)—RESCISSION BY PURCHASER—ESTOPPEL OR WAIVER. An allegation in a complaint by a purchaser for damages for failure of a vendor to perform a contract to convey that he "would now be willing to perform his contract but for the fact the defendants have placed it out of their power to perform," would not constitute a waiver of his right to rescind. *Finch v. Sprague*..... 650

5. SAME (74)—FRAUD—ACTION FOR RESCISSION—JUDGMENT—EXTENT OF RELIEF. In rescinding an exchange of properties on the ground of misrepresentation by one of the grantors and a broker acting jointly for both grantors, the refusal of the court to allow credit to the defendants for sums retained by the broker as commission and expense money was proper. *Wisner v. Carter*..... 623

6. SAME (86)—CONTRACT—PERFORMANCE—TITLE OF VENDOR—WAIVER OF DEFECTS AND OBJECTIONS. A vendor may contract to sell land he does not own, it being incumbent on him to have title at the contractual date of delivery, and knowledge by purchaser of the vendor's want of title does not constitute either waiver or acquiescence. *Finch v. Sprague*..... 650

7. SAME (94)—PERFORMANCE OF CONTRACT—PAYMENT OF PURCHASE MONEY—TENDER. Failure of a purchaser under a contract for the conveyance of land to tender the price or offer to perform on the date stipulated for performance would not place him in default, where he has knowledge the vendor is not in a position to convey the lands. *Finch v. Sprague*..... 650

8. SAME (161)—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY—PARTIAL FAILURE OF TITLE—RESCISSION. Where a contract for the conveyance of land has been rescinded by the vendor, the purchaser is entitled to abandon the contract and recover the portion of the purchase price paid thereon. *Finch v. Sprague*.... 650

Vendor and Purchaser—Continued.

9. SAME (171)—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY—DEFENSES—TENDER OF PERFORMANCE. Where a vendor, under a contract to convey, has declared a forfeiture or renunciation of the contract, and the purchaser has relied thereon and begun an action for damages, the vendor cannot reinstate the contract by an offer to perform. *Finch v. Sprague*..... 650

10. SAME (182)—REMEDIES OF PURCHASER—BREACH OF CONTRACT—DAMAGES. In an action for damages for failure to convey a quantity of land, recovery is limited to a return of the money paid, with legal interest, in the absence of evidence sufficient to show damages by way of loss of sales and contemplated profits. *Finch v. Sprague* 650

Venue:

Criminal prosecution, see CRIMINAL LAW, 2.

Verdict:

Inadequate or excessive damages, see DAMAGES, 1.
Judgment *non obstante veredicto*, see JUDGMENT, 1-3.
Setting aside for insufficiency of evidence, see NEW TRIAL, 2-4.

View:

Of premises by judge as ground for vacation of judgment, see JUDGMENT, 5.

Voluntary Payment:

Recovery of, see PAYMENT, 1; TELEGRAPHS AND TELEPHONES.

Waiver:

See APPEARANCE.
Effect of demurrer to petition to vacate decree for fraud, see DIVORCE, 2.
Of right to compensation by executor, see EXECUTORS AND ADMINISTRATORS, 12.
Of demand for bill of particulars, see PLEADING, 2.
Of right of seller to retake property sold, see SALES, 11.
Rescission of contract for sale of land, see VENDOR AND PURCHASER, 4.
Objections to title, see VENDOR AND PURCHASER, 6.

Warranty:

On sale of goods, see SALES, 6.

Waters and Water Courses:

Works for protection or improvement of lands, see DRAINS.
Damages from bursting of city water meter, see MUNICIPAL CORPORATIONS, 18, 19.

Waters and Water Courses—Continued.

1. WATERS AND WATER COURSES (78)—WATER COMPANIES—FRANCHISE—LOCATION AND SECURITY OF MAINS—POWERS OF PUBLIC SERVICE COMMISSION—EVIDENCE—SUFFICIENCY. Assuming that the state department of public works has jurisdiction to interfere with water mains laid in city streets in accordance with a franchise, no occasion therefor is shown by evidence that a city desiring to lay a hard surface pavement in one of its streets, demanded that the water company replace its wooden by iron mains or shift the mains to a parking strip, it appearing that the principal leakages had been from a main whose use had been discontinued, or from service pipes whose system of connections had been so altered as to diminish leakage to a negligible quantity, and that in the event of leakage the company could take care of it without serious interference with the hard surface pavement. *State ex rel. Yakima v. Kuykendall*..... 406

Widows:

Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS, 5-8.

Wills:

Appointment, rights, powers, duties and liabilities of executors and administrators, see EXECUTORS AND ADMINISTRATORS, 4, 10-12.

1. WILLS (20)—REQUISITES—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. A will will not be set aside on the ground of being written in a language the testatrix did not understand, if it was executed by her after full explanation in her native language as to its contents. *In re Hille's Estate*..... 205

2. WILLS (55)—CONTESTS—ATTORNEY'S FEES. Where an action is brought in good faith to contest a will and a prima facie case made out, an award of attorney's fees against contestant in the event his action fails is erroneous. *In re Hille's Estate*..... 205

3. WILLS (79-85)—RIGHTS OF DEVISEES—DEED TO EFFECT TESTATOR'S INTENTION—CONSIDERATION. Where a brother, without consideration, conveyed all his interest in a certain piece of property to his sister, in order to carry out an expressed intention of the deceased father to give that property to his daughter, such deed could not be afterwards set aside at suit of the administratrix of such brother. *Hemrich v. Hemrich*..... 124

4. WILLS (85)—RIGHTS OF DEVISEE—CLAIMS—CONSTRUCTION OF WILL—DUTY TO CANCEL. An objection that an administrator with the will annexed had not cancelled every claim which he had against the estate as required by a bequest in his favor is without merit, where the record shows he never presented any claim against the estate, and that he had filed a proper acquittance with the deceased executor of the estate. *In re Adin's Estate*..... 693

Witnesses:

Opinions, see EVIDENCE, 9.
Limiting number of witnesses, see TRIAL, 1.

1. WITNESSES (44)—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED—CORPORATION AS PARTY. Under Rem. Code, § 1211, excluding evidence by a party in interest of transactions had with a deceased person, where the personal representative of the latter sues or defends, an officer and stockholder of a corporation holding as lessee of the deceased cannot testify to an agreement whereby the deceased agreed to accept a lesser sum than that provided in the written lease as rental. *Conlan v. Spokane Hardware Co*..... 378

2. WITNESSES (61, 98-1)—EXAMINATION—LEADING QUESTIONS—HOSTILE WITNESS—RIGHT TO IMPEACH OWN WITNESS. Leading questions may be propounded by a party to a witness who proves hostile, and such witness may be impeached by showing contradictory statements before the trial. *Harringer v. Keenan*..... 311

3. WITNESSES (88-90)—REDIRECT EXAMINATION—SCOPE AND EXTENT—EXPLANATION OF TESTIMONY ON CROSS-EXAMINATION. Where defendant's witness on cross-examination had denied making a certain statement to plaintiff's counsel, and the denial had been accepted, it was not error to refuse defendant the privilege of calling out the entire conversation by redirect examination of his witness. *Surry v. Seattle Taxicab Co*..... 559

Workmen's Compensation Act:

Election of remedies by injured workman, see MASTER AND SERVANT, 1.

Writings:

Parol evidence to vary writings, see EVIDENCE, 5-8.
Requirements of statute of frauds, see FRAUDS, STATUTE OF.

Writs:

See CERTIORARI; INJUNCTION; MANDAMUS; PROHIBITION; REPLEVIN.

F. & W. J. f.
10/30/22